

REPORTS
OF THE
PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSOURI

Volume 24 MPSC 3d
January 1, 2014 – December 31, 2014

Morris Woodruff
Reporter of Opinions

JEFFERSON CITY, MISSOURI
(2017)

PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning January 1, 2014 through December 31, 2014. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2016.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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**REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI**

In the Matter of Dogwood Energy, LLC's)
Petition for Revision of Commission Rule)
4 CSR 240-3.105)

File No. EX-2014-0205

Electric. §14. Rules and regulations. Petitioner filed a petition for rulemaking that proposed amendments to the Commission's regulation on the requirements for a public utility to obtain a certificate of convenience and necessity. The Commission concluded that the proposed language did not comply with statutory requirements and so rejected the proposed language. But the Commission also directed its staff to further investigate the issues raised in the petition and draft proposed language to address those issues.

**ORDER DENYING PETITION FOR REVISION OF
COMMISSION RULE 4 CSR 240-3.105**

Issue Date: March 5, 2014

Effective Date: March 15, 2014

On January 8, 2014, Dogwood Energy, LLC filed a petition asking the Commission to amend Commission rule 4 CSR 240-3.105 to clarify that electric utilities must obtain advance approval from the Commission before acquiring electric plant built by others as a regulated asset, before acquiring electric plant located in another state, and before undertaking major renovation projects regarding its existing electric plant. In addition, Dogwood's proposed regulation would require electric utilities to fully consider alternatives for renovation or construction of electric plant by means of competitive bidding. Dogwood proposed specific language to amend the regulation as part of its petition.

After receiving Dogwood's petition, as required by Section 536.041, RSMo (Supp. 2012), the Commission provided a copy of that petition to the Joint Committee on Administrative Rules and to the Office of Administration. Before deciding whether to grant Dogwood's petition, the Commission directed its Staff to investigate that petition and to file a recommendation. The Commission also invited other interested stakeholders to offer their recommendations.

Staff filed its recommendation on February 14. Staff agrees with Dogwood that 4 CSR 240-3.105 should be amended to address legal issues that arose from decisions issued by the Missouri Court of Appeals in 2005 and 2008.¹ Staff asserts that such a rulemaking should address issues such as:

- (a) Whether separate certificates of convenience and necessity (CCNs) should be required for each generating unit at a multi-unit site, in particular if there is a lapse of more than two years between the end of construction of one unit and the beginning of construction of the next unit;
- (b) Whether separate CCNs should be required for substantial renovation or refurbishment of an existing unit that changes the principal fuel used, increases the capacity of the unit, extends the life of the unit, or appreciably changes the emissions, noise level, or traffic from or at the plant;

¹ *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. W.D. 2005) and *State ex rel. Cass County v. Public Service Comm'n*, 259 S.W.3d 544 (Mo. App. W.D. 2008).

- (c) Whether separate CCNs should be required for the construction of a generating unit in a state other than Missouri that will be treated in rate base and operating expense for the purpose of setting Missouri rates for Missouri native load; and
- (d) Whether separate CCNs should be required for acquiring electric plant built by others in Missouri or another state to be treated in rate base and operating expense for the purpose of setting Missouri rates for Missouri native load.

While Dogwood's petition raises these same issues, Staff disagrees with much of the revised regulatory language that Dogwood proposes. Nevertheless, Staff recommends that the Commission use Dogwood's petition as a vehicle to amend a regulation that should be amended.

Kansas City Power & Light Company (KCP&L) and KCP&L Greater Missouri Operations Company (GMO), Union Electric Company, d/b/a Ameren Missouri, and The Empire District Electric Company also filed responses to Dogwood's petition. KCP&L, GMO, and Ameren Missouri argue that the revised regulation proposed by Dogwood is unnecessary and beyond the Commission's regulatory authority in that it would require the Commission to illegally intrude into the management of the utilities. They urge the Commission to reject Dogwood's petition.

Ameren Missouri and Empire also responded to Staff's recommendation that the Commission use Dogwood's rulemaking petition as a vehicle to consider amendments to the regulation, even if the Commission does not adopt the specific regulatory language proposed by Dogwood. Ameren Missouri and Empire suggest that if the Commission is inclined to consider revising its regulation it should not start with the language proposed by Dogwood. Instead, they urge the Commission to deny Dogwood's petition and to start fresh by opening a new working case, through which all interested stakeholders would have an opportunity to provide input on an appropriate rule revision.

Section 536.041, RSMo (Supp. 2012), allows any person to petition a state agency requesting the adoption, amendment, or repeal of any rule. That section further requires the agency to submit a written response to the rulemaking petition within sixty days of receipt of the petition, indicating its determination of whether the proposed rule should be adopted. Similarly, Commission Rule 4 CSR 240-2.180(3)(B) requires the Commission to respond to a petition for rulemaking by either denying the petition in writing, stating the reasons for its decision, or initiate a rulemaking in accordance with Chapter 536, RSMo. 4

Section 536.041 also requires the agency to offer a concise summary of the agency's "findings with respect to the criteria set forth in subsection 4 of section 536.175." The criteria in subsection 4 are designed to guide the agency's review of its existing rules under the periodic review process required by that statute. As a result, those criteria do not precisely match the review needed to determine whether Dogwood's rulemaking petition should be granted. However, the gist of the criteria is to require the agency to consider whether the rule is properly drafted to be consistent with the language and intent of the authorizing statute; whether the rule imposes an unnecessary regulatory burden; and whether a less restrictive, more narrowly tailored, or alternative rule could accomplish the same purpose.

The Commission finds that the specific regulatory language offered by Dogwood does not meet the statutory criteria. Staff and the electric utilities that responded to Dogwood's petition raise significant concerns about whether Dogwood's proposal is consistent with the Commission's authority and whether the revised rule would impose an unnecessary regulatory burden on the utilities. For that reason, the Commission will deny Dogwood's petition.

Nevertheless, the Commission will undertake a review of its regulation as suggested by Staff, and will seek input from all interested stakeholders before deciding whether to submit revised language through the formal rulemaking process. In addition to the four issues identified by Staff and set forth earlier in this order, the Commission will also review whether to require competitive bidding for renovation or construction of electric plant. This list of issues should not be considered to be exclusive. During the review process, Staff or any stakeholder may raise any other issue they believe should be brought to the Commission's attention.

To facilitate Staff's efforts to draft an appropriate rule, and to allow all interested stakeholders an opportunity to offer their advice concerning that rule, the Commission will issue a separate order to establish a working case to facilitate a series of workshops led by Staff and to contain the informal comments that may result from that workshop process. A separate working case is appropriate for that process to allow the informal comments presented in the workshops regarding initial drafts of the rule to be kept separate from the comments on the proposed rule that may be filed during any subsequent formal rulemaking process.

The Commission does not want the workshop process to unreasonably delay the promulgation of a revised rule. Therefore, the Commission will direct its Staff to submit a revised rule for the Commission's consideration no later than August 29, 2014.

THE COMMISSION ORDERS THAT:

1. Dogwood Energy LLC's rulemaking petition for revision of Commission rule 4 CSR 240-3.105 is denied.
2. The Commission's Staff shall prepare and submit a proposed rule revising Commission rule 4 CSR 240-3.105 no later than August 29, 2014.
3. As required by Section 536.041, RSMo, a copy of this order shall be provided to the Joint Committee on Administrative Rules and to the Commissioner of Administration.
4. This order shall become effective on March 15, 2014.

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.

Woodruff, Chief Regulatory Law Judge

In the Matter of the Joint Application of Missouri-
 American Water Company and Emerald Pointe Utility
 Company for Missouri-American Water Company to
 Acquire Certain Water and Sewer Assets of the
 Emerald Pointe Utility Company in Connection
 Therewith, Certain Other Related Transactions)
)
) **File No. WO-2014-0113**
)
)
)

In the Matter of the Joint Application of Missouri-
 American Water Company and Emerald Pointe Utility
 Company for Missouri-American Water Company to
 Acquire Certain Water and Sewer Assets of the
 Emerald Pointe Utility Company in Connection
 Therewith, Certain Other Related Transactions)
)
) **File No. SO-2014-0116**
)
)
)

SEWER. §2. Certificate of convenience and necessity. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's certificate of convenience and necessity to the other company.

WATER. §2. Certificate of convenience and necessity. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's certificate of convenience and necessity to the other company.

CERTIFICATES. §35 Existing service and facilities, §45 Water, §47 Sewers, §53 Consolidation or merger. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's certificate of convenience and necessity to the other company

ORDER APPROVING TRANSFER OF ASSETS AND CERTIFICATE OF CONVENIENCE AND NECESSITY AND GRANTING WAIVER

Issue Date: March 12, 2014

Effective Date: March 22, 2014

On October 25, 2013, Missouri-American Water Company ("MAWC") and Emerald Pointe Utility Company ("Emerald Pointe") filed a joint application seeking authority for Emerald Pointe to sell substantially all its assets to MAWC. MAWC is a regulated water and sewer company providing water service to approximately 454,000 customers and sewer service to approximately 4,000 customers in numerous cities and counties within Missouri. Emerald Pointe is a regulated water and sewer company holding a certificate of convenience and necessity from the Commission and providing service to approximately 380 customers in Taney County, Missouri.

The Commission issued notice and set a deadline for intervention requests, but no persons requested to intervene in this proceeding. On January 24, 2014, the Commission's Staff filed its Recommendation and Memorandum to approve the transfer of assets, subject to certain conditions, including the following:

1. Emerald Pointe should be authorized to sell and transfer its water and sewer utility assets to MAWC, and MAWC should be authorized to acquire Emerald Pointe's water and sewer utility assets. The order should grant MAWC the CCN presently held by Emerald Pointe to provide water and sewer service within the authorized service areas. The transfer of the CCN shall be effective concurrently with closing of the assets between MAWC and Emerald Pointe.
2. MAWC shall notify the Commission when it has closed on the Emerald Pointe assets within five (5) business days after such closing has occurred. If closing has not occurred within thirty (30) days after the effective date of an order approving this *Application*, MAWC shall file a status report on the status of the sale closing, and file a status report every thirty (30) days thereafter until the closing has occurred.
3. MAWC is authorized to, upon closing, provide service on an interim basis under the water and sewer tariffs currently on file and approved for Emerald Pointe, until MAWC tariff sheets regarding rates, service areas, and adoption notices, to be filed as ordered herein, become effective.
4. MAWC shall file tariff sheets for its water tariff No. 13 that include rates, service charges with modifications to rule number references, service area maps, service area descriptions, and appropriate modifications to the index sheet. Emerald Pointe's existing water tariff shall be canceled upon the effective date of these tariff sheets.
5. MAWC shall file a sewer tariff adoption notice sheet, along with a modified index sheet to indicate the presence of the adoption notice sheet.
6. MAWC shall record a value in the amount stated in Staff's recommendation for the amount of the Emerald Pointe acquisition plant in service, net of accumulated depreciation and CIAC, at December 31, 2013, as described within Staff's memorandum, and MAWC shall not seek recovery of any acquisition premium, related to this transaction, through rates.
7. MAWC shall adopt the Emerald Pointe depreciation schedule for water assets, and apply MAWC's existing depreciation schedule for sewer assets presently approved for MAWC, as shown in Attachments A and B to Staff's recommendation.
8. MAWC shall calculate and record depreciation expenses on a going forward basis subsequent to the date of close, using the above- mentioned depreciation schedules.
9. MAWC shall maintain utility plant records and customer account records, and keep all books and records, including plant property records, in accordance with the NARUC Uniform System of Accounts, as described in Staff's memorandum.
10. MAWC shall, after closing on the assets, distribute to former Emerald Pointe customers an informational brochure detailing the rights and responsibilities of the utility and its customers, which shall adhere to the provisions of Commission Rule 4 CSR 240-13.040(3).

11. MAWC shall provide adequate training to all customer service representatives with respect to adopted Emerald Pointe rates and rules prior to the Emerald Pointe customers receiving their first bills for service from MAWC.
12. MAWC shall provide to the Commission's EMSU Staff a sample of forty- five (45) billing statements of its first month bills that include copies of water and sewer billings issued to the Emerald Pointe customers, in order to check for accuracy, within ten (10) days after issuance of those bills.
13. MAWC shall include the former Emerald Pointe customers in its regular monthly Call Center reporting to Staff.
14. MAWC shall provide to the Commission's EMSU Staff, within thirty (30) days after this order, a completed transition schedule for the actions necessary to successfully transition former customers of Emerald Pointe into MAWC's customer information system, and implementation dates for when bills will begin to be issued to Emerald Pointe customers by MAWC.
15. MAWC shall provide to the Commission's EMSU Staff, within sixty (60) days after this order, a completed acquisition checklist.
16. The Commission's order should make no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the transfer of the CCN, including future expenditures by MAWC, in any later proceeding.

On February 6, 2014, the Office of the Public Counsel filed a response to Staff's Recommendation and Memorandum, indicating that it does not oppose Staff's recommendation that the Commission approve the joint application subject to the conditions described in Staff's Recommendation and Memorandum. In *Staff's Response* filed on February 24, 2014, Staff amended its Recommendation and Memorandum (collectively, the "Amended Recommendation"). No party opposed the conditions in Staff's Amended Recommendation, and MAWC affirmatively agreed to all of Staff's proposed conditions. No party has requested an evidentiary hearing, and no law requires one.¹ Therefore, this action is not a contested case² and the Commission need not separately state its findings of fact.

The Commission has jurisdiction to approve a transfer of assets because "[n]o . . . water corporation or sewer corporation shall hereafter sell . . . its . . . works or system . . . without having first secured from the commission an order authorizing it so to do".³ The Commission will only deny the application if approval would be detrimental to the public interest.⁴ The parties agree that the public interest will suffer no detriment from the sale under the conditions set forth in the Staff's Amended Recommendation. MAWC and Emerald Pointe are current on the submission of their annual assessments and annual reports. There are also no current violations or issues with the Department of Natural Resources that need immediate correction, and there are no deficiencies with respect to the water or sewer system.

¹ *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n*, 776 S.W.2d 494, 496 (Mo. App., W.D.1989).

² Section 536.010(4), RSMo Supp. 2012.

³ Section 393.190.1, RSMo 2000.

⁴ *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

Based on the verified filings, the Commission independently finds and concludes that the sale and transfer of assets will cause no detriment to the public interest, if the sale and transfer occur under the conditions in Staff's Amended Recommendation. Subject to such conditions, therefore, the Commission will approve the application and incorporate the Amended Recommendation's terms into this order. Pursuant to Section 393.320.6, RSMo Supp. 2012, and by agreement among the parties, the Commission will consolidate Emerald Pointe's water and sewer systems into MAWC's existing Stonebridge service area for ratemaking purposes.

The Commission may grant a water or sewer corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either "necessary or convenient for the public service."⁵ The Commission articulated the specific criteria to be used when evaluating applications for utility CCNs in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.⁶ The Commission finds that MAWC possesses adequate technical, managerial, and financial capacity to operate the water and sewer systems currently certificated for Emerald Pointe. The Commission concludes that the factors for granting a certificate of convenience and necessity to MAWC have been satisfied and that it is in the public interest for MAWC to provide water and sewer service to the customers currently being served by Emerald Pointe. Consequently, based on the Commission's independent and impartial review of the verified filings, the Commission will grant MAWC the certificate of convenience and necessity presently held by Emerald Pointe to provide water and sewer service within the authorized service areas.

The application also asked the Commission to waive the 60-day notice requirement under 4 CSR 240-4.020(2), if necessary. The applicants explain that such waiver may not be necessary since matters of this type rarely become contested cases. However, the applicants assert that good cause exists in this case for granting such waiver because the application was filed as soon as possible due to the nature of this particular transaction. In addition, the applicants state that no purpose would be served to require the applicants to wait sixty days after their agreement to file the application with the Commission. The Commission finds that good cause exists to waive the notice requirement and a waiver of 4 CSR 240-4.020(2) will be granted.

⁵ Section 393.170.3, RSMo 2000.

⁶ The factors have also been referred to as the "Tartan Factors" or the "Tartan Energy Criteria." See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

THE COMMISSION ORDERS THAT:

1. A waiver of the notice requirement under Commission Rule 4 CSR240-4.020(2) is granted.
2. The joint application for the sale and transfer of assets filed by Missouri-American Water Company and Emerald Pointe Utility Company is approved, subject to the conditions and requirements contained in Staff's Recommendation and Memorandum, as amended by *Staff's Response*, including those conditions described in the body of this order.
3. Emerald Pointe Utility Company is authorized to sell and Missouri-American Water Company is authorized to acquire the assets identified in the joint application.
4. Missouri-American Water Company is granted the certificate of convenience and necessity presently held by Emerald Pointe Utility Company to provide water and sewer service within the authorized service areas, effective upon the closing of the sale and transfer of assets transaction between Missouri-American Water Company and Emerald Pointe Utility Company.
5. Emerald Pointe Utility Company's water and sewer systems shall be consolidated into Missouri-American Water Company's existing Stonebridge service area for ratemaking purposes.
6. Missouri-American Water Company and Emerald Pointe Utility Company are authorized to enter into, execute and perform and to take any and all other actions which may be reasonably necessary and incidental to the performance of the acquisition.
7. Nothing in this order constitutes a finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters, including future expenditures by Missouri-American Water Company, in any later proceeding.
8. This order shall become effective on March 22, 2014.
9. This file shall be closed on March 23, 2014.

R. Kenney, Chm., Stoll, W. Kenney, and Hall, CC., concur.

Bushmann, Regulatory Law Judge

In the Matter of the Application of Lincoln)
 County Sewer & Water, LLC for Approval of a) **File No. SR-2013-0321**
 Rate Increase)

SEWER. §13. Additions and betterments. The Commission excluded from a water company's rate base the cost of equipment to serve customers in excess of the number it had.

WATER. §15. Additions and betterments. The Commission excluded from a water company's rate base the cost of equipment to serve customers in excess of the number it had.

SEWER. §16. Costs and expenses. The Commission included in a water company rate base the company's costs for employee salaries, vehicle mileage, telephone and internet service, sludge hauling, environmental management and testing, office supplies and postage for an environmental consumer confidence report, late fees.

SEWER. §18. Depreciation. The Commission included in a water company rate base a depreciation rate and amount that included the removal of a damaged pump not yet accounted for.

WATER. §18. Costs and expenses. The Commission included in a water company rate base the company's costs for employee salaries, vehicle mileage, telephone and internet service, sludge hauling, environmental management and testing, office supplies and postage for an environmental consumer confidence report, late fees.

WATER. §20. Depreciation. The Commission included in a water company rate base a depreciation rate and amount that included the removal of a damaged pump not yet accounted for.

SEWER. §21. Accounting. The Commission follows its own regulation, which requires a public utility to record its expenses and revenues in accordance with the Uniform System of Accounts.

WATER. §23. Accounting. The Commission follows its own regulation, which requires a public utility to record its expenses and revenues in accordance with the Uniform System of Accounts.

REPORT AND ORDER

Issue Date: April 2, 2014

Effective Date: May 2, 2014

Appearances

Dean L. Cooper and James D. Burlison for Lincoln County Sewer & Water, LLC.

Christina L. Baker for the Office of the Public Counsel.

Kevin A. Thompson and Amy E. Moore for the Staff of the Missouri Public Service Commission.

JUDGE: Kennard Jones, Senior Regulatory Law Judge

Background:

Although formally beginning on December 4, 2012, with Lincoln County Sewer and Water, LLC (LCSW) filing this rate increase request, this matter actually began on February 10, 2011, with the Staff of the Commission filing a complaint¹ against Dennis Kallash, Toni Kallash, Bennington Inc. and Bennington Water, Inc. In that case, Staff complained that respondents were providing sewer and water service to the public without a Certificate of Convenience and Necessity.

¹ File No. WC-2011-0253 and SC-2011-0254.

Toward resolution of the complaint case, LCSW was formed on May 9, 2011, by James Burlison.² On July 19, 2011, LCSW filed applications with the Commission for certificates to provide water and sewer service in the Bennington and Rockport subdivisions of Lincoln County, and to assume the assets of Bennington Inc. and Bennington Water, Inc.³ The certificate cases were resolved through a Stipulation and Agreement.⁴

At the time, the company provided water service at a flat rate because there were no meters installed. In anticipation of meters being installed over time, the parties agreed to the following metered and unmetered rates:

Bennington Water:	unmetered flat rate:	\$26.72/month metered
	customer charge:	\$15.10/month metered
	commodity charge:	\$3.45/1000 gallons
Bennington Sewer: flat rate		\$39.39/month
Rockport Water:	unmetered flat rate:	\$39.80/month metered
	customer charge:	\$13.91/month metered
	commodity charge:	\$5.57/1000 gallons
Rockport Sewer: flat rate		\$34.07/month

The Commission issued an order approving the agreement on June 27, 2012,⁵ and approved the tariff sheets reflecting the above rates on July 16, 2012.⁶

The Rate Increase Request

With its certificates in place and metered and unmetered rates approved by the Commission, LCSW filed a request to increase its rates. In addition to increases in maintenance and operation, the company pointed out that the rate increase request was primarily driven by the installations of new, automated meters and the associated costs.

Upon request of the Office of the Public Counsel, the Commission held a local public hearing on August 20, 2013. Eight people testified. Customers expressed concerns regarding: the necessity of automated meters given the number of customers served; problems with being on fixed incomes and having to pay more for water; and, the company's inability to show costs that justify higher rates.⁷ In addition to the issues surrounding the installation of automated meters, the parties disagreed on a number of issues. Those issues are discussed separately, below.

² See *Articles of Organization* and *Certificate of Organization* of Lincoln County Sewer and Water, LLC; Secretary of State's website. James Burlison is an attorney who has entered his appearance in this matter on behalf of Lincoln County Sewer and Water.

³ File Nos. WA-2012-0018 and SA-2012-0019.

⁴ File No. WA-2012-0018, EFIS Item No. 39.

⁵ File No. WA-2012-0018, *Order Approving Unanimous Stipulation and Agreement, Approving Transfer of Assets and Granting Certificates of Convenience and Necessity*; EFIS Item No. 42.

⁶ File No. WA-2012-0018, *Order Approving Tariff Filings in Compliance with Commission Order*; EFIS Item No. 49.

⁷ Local Public Hearing transcript, EFIS Item No. 18.

The Commission held an evidentiary hearing on November 5, 2013. The parties filed post hearing briefs and the Commission makes the following finding and conclusions.

Conclusions of Law – Jurisdiction

1. LCSW is a public utility as defined in Section 386.020(43), RSMo. It is also a sewer corporation as defined in Section 386.020(49), RSMo and a water corporation as defined in Section 386.020(59), RSMo. As such, LCSW is subject to the Commission's jurisdiction under Chapters 386 and 393, RSMo.

2. Under Section 393.140(11), RSMo, the Commission has the authority to regulate the rates LCSW may charge its customers for sewer and water service.

Conclusions of Law – Determination of Just and Reasonable Rates

1. In determining the rates LCSW may charge its customers, the Commission is required to determine that the rates are just and reasonable.⁸ Lincoln County has the burden of showing its proposed rates are just and reasonable.⁹

2. In determining whether the proposed rates are just and reasonable, the Commission must balance the interests of the investor and the consumer.¹⁰ In further defining its vision of just and reasonable rates, the United States Supreme Court has held that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.¹¹

Later, the Court states that:

'[R]egulation does not insure that the business shall produce net revenues.' But, such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.¹²

⁸ Section 393.150.2, RSMo.

⁹ Section 393.150.2, RSMo.

¹⁰ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

¹¹ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

¹² *Federal Power Commission v. Hope Natural Gas Co.*, 320, U.S. 591, 603 (1944).

3. In undertaking the balance required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said: Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for particular circumstances.¹³

4. Finally, quoting the United States Supreme Court in *Hope*, the Missouri Court of Appeals stated that:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.'.... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.¹⁴

RATE CASE ISSUES

What is the appropriate amount, if any, to include in rates for the purchase, installation, and operation and maintenance of the company's automated meters?

Whether the cost of the automated meter reading system (AMR) should be passed on through rates is the primary issue in this rate case. Staff and the company agree that the cost of the meters should be included in rates. OPC posits that the purchase of automated meters is not warranted given the small number of customers the company serves.

Findings of Fact

1. LCSW provides water and sewer services to 122 customers in Lincoln County, Missouri.¹⁵

2. LCSW, the Staff of the Commission and the Office of the Public Counsel entered into an agreement setting the company's current rates.¹⁶

3. The agreement required LCSW to install a minimum of 6 water meters per year in the Rockport subdivision and 5 meters per year in the Bennington subdivision.¹⁷

4. At the time of entering into the agreement that disposed of the certificate case, Mr. Kallash made Staff aware that it was his intention to install all of the meters at one time.¹⁸

¹³ *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

¹⁴ *State ex rel. Associated Natural Gas Co. V. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 8673 (Mo. App. E.D. 1985).

¹⁵ Transcript; page 102, lines 3-5.

¹⁶ File No. WA-2012-0018, EFIS item no. 39.

¹⁷ File No. WA-2012-0018, Unanimous Stipulation and Agreement (EFIS item no. 39), paragraph 16.

¹⁸ Transcript; page 90, line 13 to page 91, line 14.

5. Standard meters were not expressly contemplated in the context of the agreement.¹⁹

6. Mr. Kallash believed that he would only be allowed to recover \$1.50 in rates for meter reading of each house per month.²⁰

7. Mr. Kallash obtained a bid of \$2.75 per meter read per month.²¹

8. Mr. Kallash believed that he would have lost money while recovering \$1.50/home/month for meter reading.²²

9. Through discussions during the certificate case, concerns were brought up about customer water usage; e.g. outside water connections being left on.²³

10. Mr. Kallash has observed excessive water usage, with water running down the street and has found it necessary to shut off hydrants.²⁴

11. With customers presumably over-using and wasting water, Mr. Kallash installed all of the meters at once in order to be able to determine what the usage was, prior to being regulated, in order to avoid wasting water.²⁵

12. Mr. Kallash secured a loan from the bank to install all of the meters at once.²⁶

13. Both the company and Staff agreed that installation of all of the meters was a good idea.²⁷

14. The cost of manual read meters, including installation, is \$35,800.²⁸

15. The cost of the automated meters is \$32,867.²⁹

16. The cost of installation for the automated meters is \$32,698.³⁰

17. The cost of the meter-reading device is \$9,438 and the training regarding the use of the device is \$1,500.³¹

18. A benefit of the automated meters is the capability to record water usage on a daily or hourly basis and can be helpful for Staff when investigating complaints.³²

19. Another benefit of the automated meters is that they allow the operator to retrieve information on usage and leaks over periods of time spanning from one to several days to a whole billing period.³³

20. The metered water rate approved by the Commission in the certificate cases was based on estimated amounts for standards meters, installations, and expenses related to hiring a meter reader.³⁴

¹⁹ Transcript; page 92, lines 14-22.

²⁰ Transcript; page 95, lines 16-18.

²¹ Transcript; page 77, lines 3-17; Transcript; pages 123, and 128-129.

²² Transcript; page 95, lines 19-24.

²³ Transcript; page 93, line 7 to page 95, line 9.

²⁴ Transcript; page 93, lines 5-13.

²⁵ Transcript; page 93, lines 5-23.

²⁶ Transcript; page 95, lines 11-16.

²⁷ Transcript; page 93, line 7 to page 95, line 9.

²⁸ Addo Surrebuttal (OPC 3), page 3, line 16.

²⁹ Johansen Direct (LCSW 1), page 4, line 5.

³⁰ Johansen Direct (LCSW 1), page 4, line 6;

³¹ Johansen Direct (LCSW 1), page 6, lines 2-3.

³² Transcript; page 128, line 12 to page 129, line 24.

³³ Transcript; pages 123, and 128-129.

³⁴ Addo Rebuttal (OPC 2) page 12, lines 15-18.

21. The total amount for AMR costs that Staff has included in its revised accounting schedules for the AMR system is \$46,141 for Bennington and \$25,515 for Rockport.³⁵

22. There are several regulated water companies in Missouri using meters read by radio signal.³⁶ Specifically, Lake Region has 646 customers with 95% radio-read meters. Liberty-Algonquin, Noel, KMB has 2,112 customers with remote, touch and radio-read meters but plans to upgrade to all radio-read. Ozark Shores has 1,856 customers with 95% radio-read meters. Raytown has 6,508 customers with both manual and radio-read meters. Roy-L Utilities, serving 62 customers, uses manually-read meters and has purchased, but not installed, radio-read meters. Finally, Missouri-American, serving 450,000 customers uses touch and radio-read meters. Missouri-American has, like Roy-L, purchased radio-read meters but has yet to install them.

Conclusions of Law

1. The Conclusions of Law set out above are controlling for this discussion.

2. The Commission must insure just and reasonable rates. To determine whether the rates were just and reasonable, we must consider whether the order could reasonably be expected to maintain financial integrity, attract necessary capital, fairly compensate investors for the risk they assume, and protect relevant public interest.³⁷

Discussion

A central question in resolving this issue is whether Lincoln County acted reasonably in purchasing radio read meters. The Office of the Public Counsel rests its opposition to the purchase of the meters on the fact that the company serves only 122 customers and that no other company in Missouri, this size, has invested in automated meters, which cost about twice as much as manually-read meters. Public Counsel goes on to state that those few customers should not have to bear the cost of such an extravagant purchase.

However, reasonableness transcends the number of customers served. At the time of purchase, the company was under the impression that the Commission would allow recovery of only \$1.50 per meter, per month, for the cost of meter reading. The only bid the company obtained was for \$2.75 per meter, per month. The company reasoned that if it was necessary for someone to manually read the meters each month, it would take a loss of \$1.25 per meter, per month.

Additionally, water consumption/waste was an issue about which the company and the Staff of the Commission discussed. The company had concerns about customers wasting water by leaving outside hoses running so long that water ran down the street. Automated meters will allow the company to monitor usage much closer than will standard meters and will therefore afford the company an opportunity to address wasteful consumption.

The Commission cannot ignore that the company secured a bank loan in order to purchase the automated meters. Irreparable economic harm to the company could result if the Commission denies rate recovery of this investment.³⁸

³⁵ Addo Surrebuttal, (OPC 3) page 3, lines 1-5.

³⁶ Late-Filed Commission Exhibit No. 1.

³⁷ *State ex re. Union Electric Co. v. Public Service Comm.* 765 SW2d 618, 625 (Mo. App. E. D. 1988).

³⁸ Transcript; page 177, lines 4-9.

It is helpful to compare standard and automated meters through a 10-year payoff analysis: The total cost of automated meters (meters, installation, meter-reading device and training) is about \$76,503. This figure divided by 10 years is \$7,650.30. This per-year cost can then be divided by the number of customers (122), which equals \$62.71. This figure divided by 12 months equals \$5.23 per month, per customer for automated meters over a 10-year period.

The cost of standard meters is \$35,800. This divided by 10 years is \$3,580 per year. This per-year cost can then be divided by the number of customers to equal \$29.34; which, divided by 12 is \$2.45 per month, per customer. However, if the cost of standard meters, rather than automated meters, is allowed in rates, then the Commission must also allow the cost of meter reading. With the company's bid of \$2.75 per meter, per month added to the \$2.45 calculated above, the total is \$5.20. This is only \$0.03 less than the alternative automated meter. If Staff and OPC's figure of \$1.50/meter/month is used, the result is \$1.28 less than the use of automated meters.

The benefits of automated meters, the financial risk taken by the company and the apparent reasonableness of Mr. Kallash's decision to purchase automated meters in order to avoid a monthly loss on meter reading, outweigh the financial burden on each customer. Also, under the above analysis, had Mr. Kallash purchased standard meters, meter-reading costs would continue beyond 10 years. Thus, in the long run, the company will save on meter reading.

And, finally, although only a few companies in Missouri use automated meters, the technology is beneficial and inevitable. Were the Commission to base its decision on this fact, no small companies would ever advance technologically through the use of automated meter.

The amount to be included in rates, with regard to the automated meters, installation, equipment and training is \$76,503.

What is the appropriate amount to include in rates for the company's billing program?

LCSW has purchased a billing program, which complements the automated meters. OPC would have the Commission disallow this cost. LCSW and Staff opine otherwise.

Findings of Fact

23. The company is currently producing bills through its billing program.³⁹

24. The billing program has features connected to billing that operate separately from the remote read meters.⁴⁰

25. The billing program that facilitates use of the AMR was not taken into account when the parties agreed on the rates during the certificate case.⁴¹

26. The billing program is not needed just because the company installed remote- read meters, but is used to create the company's monthly bills, track customer payments, track the status of customer accounts, create late notices, calculate late fees, create disconnect and reconnect orders and create disconnect letters.⁴²

³⁹ Transcript; page 148, lines 13-18.

⁴⁰ Transcript; page 148, lines 19-22.

⁴¹ Transcript; page 150, lines 3-6.

⁴² Johansen Direct (LCSW 1), page 7, lines 2-8.

27. The billing program is used for customer contact information, account history, water usage history, service location and meter information.⁴³

28. The cost of the billing program is \$3,745.⁴⁴

29. Inclusion of the billing program will require 12 fewer hours per month for payroll expense of office personnel.⁴⁵

Conclusion of Law

1. The Conclusions of Law set out above are controlling for this discussion.

Discussion

Although the billing program operates separately from the automated meters, the automated meters will be largely ineffective without the billing program. Having decided that the company will be allowed to include the costs of automated in rates, it is reasonable that the cost associated with the billing program also be included.

What is the appropriate beginning balance for the company's rate base?

Although rate base was agreed upon during the certificate cases, the company suggests that there items that should have been included that were not.

Findings of Fact

30. The amount of rate base agreed to in the Stipulation and Agreement from the certificate case is \$245,957.⁴⁶

31. The company proposes that all costs were not included – for example: engineering fees, the structures that house the wells and/or storage tanks and the base rock and concrete pads for the water storage tanks.⁴⁷

32. The company argued that the value of the items that should be included range from \$75,000 to \$100,000.⁴⁸

33. These additional items that the company proposes should now be added to rate base existed at the time the parties entered into the Stipulation and Agreement.⁴⁹

Conclusion of Law

1. The Conclusions of Law set out above are controlling for this discussion.

⁴³ Johansen Direct (LCSW 1), page 7, lines 6-8.

⁴⁴ Johansen Direct (LCSW 1), page 7, line 12.

⁴⁵ Johansen Direct (LCSW 1), page 7, lines 20-22.

⁴⁶ Case No. WA-2012-0018, Unanimous Stipulation and Agreement, paragraph 8, EFIS Item No. 39.

⁴⁷ Johansen Direct (LCSW 1), page 14, lines 16-21.

⁴⁸ Transcript; page 160, lines 17-23.

⁴⁹ Transcript; page 155, line 25 – page 156, line 25.

Discussion

The company has not shown that the agreed-upon rate base should be changed. The company argues that certain items were not included when the parties agreed to rate base in the certificate case. However, those items existed at the time of the Agreement. For the Commission to now undermine the Agreement without any change in circumstance is unreasonable. Further, the company's position is supported by examples of items and a guess as to the value of those items, with a \$25,000 range. The range alone is 10% of the agreed-upon rate base. As a default, the company suggests that the Commission direct the parties to reevaluate rate base. This suggests that there is insufficient evidence to determine rate base. This being so, the company has not carried its burden in this regard.

The rate base, as agreed upon by the parties, shall remain \$245,957.

What should the adjustment be to rate base for excess capacity in the company's Rockport facilities?

LCSW has built facilities that are capable of serving more than the number of customers in the subdivision. The question is whether current customers should have to pay for facilities that include capacity that may not be useful to them.

Findings of Fact

34. The Rockport water and sewer facilities were built to serve the overall development, which is not yet fully populated.⁵⁰

35. The Rockport subdivision has 210 lots, with additional undeveloped land within the requested service area.⁵¹

36. There are 72 homes in the Rockport subdivision.⁵²

37. A capacity adjustment reduces, or disallows, part of the capital investment of one or more plant items from the rate calculation, usually because there is substantially more plant capacity and correspondingly more investment than what is reasonably needed to provide service to current ratepayers.⁵³

38. Specifically, there are three items in the Rockport development that all parties agree have excess capacity; the water storage tank, the submersible well pump and the sewage treatment facility.⁵⁴

39. Through the Department of Natural Resources (DNR), the company is permitted to serve 210 customers with the water storage tank.⁵⁵

40. The average customer/home uses 180 gallons of water per day.⁵⁶

⁵⁰ Johansen Direct (LSCW 1), page 12, lines 16-17.

⁵¹ Merciel Rebuttal (Staff 4), page 5, lines 14-16.

⁵² Transcript; page 336, lines 13-14.

⁵³ Merciel Rebuttal (Staff 4), page 2, lines 20-23.

⁵⁴ Merciel Rebuttal (Staff 4), page 5, lines 6-10.

⁵⁵ Johansen Direct (LSCW 1), page 13, lines 3-5.

⁵⁶ Merciel Rebuttal (Staff 4), page 15, lines 16-18.

41. The water storage tank has a capacity of 44,000 gallons and can serve 244 customers per day.⁵⁷

42. Based on current usage, the company's Rockport facility has capacity that exceeds existing customer levels and the levels in the DNR's permit.⁵⁸

43. Based on the DNR permit and the number of customers in the development, the company's adjustment is 65.71% or 72/210.

44. Based on a capacity 44,000 gallons, with a current level of 72 customers each using 180 gallons per day, or a total of 12,960 gallons/day, Staff's suggested disallowance is 70% because 29.4% (12,960/44,000) of the capacity is being used.⁵⁹

45. Staff observed the well pump capacity of 420 gallons per minute with a desired maximum run time of 14 hours per day.⁶⁰

46. Under the company's analysis, 72 customers currently use 34.29% of the capacity and the adjustment should be 65.71%.⁶¹

47. Under Staff's analysis, current customers use 12.24% of the capacity and the disallowance should be 87%.⁶²

48. The submersible well pump has a capacity of 352,800 gallons per day.⁶³

49. Staff assumed a peak usage of 600 gallons per customer, resulting in a daily usage of 43,200 gallons for the 72 existing customers.⁶⁴

50. Based on a capacity of 352,800 gallons per day and Staff's usage estimate of 43,200, 12.2% of the pump is being used by existing customers.

51. According to DNR standards, a 210-lot subdivision must be served by a sewage treatment plant that is designed handle 78,000 gallons per day.⁶⁵

52. The flow level for the sewage treatment facility at the time of the certificate case was 14,999 gallons per day.⁶⁶

53. Staff's disallowance is based on the current flow of 14,999 gallons and DNR's permitted capacity of 78,000 gallons per day, resulting in a usage of 19.2% or an 80.8% disallowance.

54. There has been an increase in customers and, in consideration thereof, Staff has applied a 77% disallowance.⁶⁷

55. The company has built excess capacity and has the opportunity to grow into it.⁶⁸

⁵⁷ Merciel Rebuttal (Staff 4), page 18, lines 22-23.

⁵⁸ Transcript; page 336, lines 13-25.

⁵⁹ Merciel Rebuttal (Staff 4), page 7, lines 3-7.

⁶⁰ Merciel Rebuttal (Staff 4), page 7, line 22-23.

⁶¹ 72/210 (current number of customer/number of customer permitted to be served by DNR).

⁶² 43,200 gallons/352,800 gallons (estimated customer usage/actual usage capacity).

⁶³ Merciel Rebuttal (Staff 4), page 8, lines 1-2.

⁶⁴ Merciel Rebuttal (Staff 4), page 8, lines 2-5.

⁶⁵ Transcript; page 342, lines 2-4.

⁶⁶ Merciel Rebuttal (Staff 4) page 9, lines 8-11.

⁶⁷ Merciel Rebuttal (Staff 4) page 9, lines 2-5.

⁶⁸ Transcript; page 350, lines 2-4.

Conclusions of Law

1. The Conclusions of Law set out above are controlling for this discussion.
2. The Commission must insure just and reasonable rates. To determine whether the rates were just and reasonable, we must consider whether the order could reasonably be expected to maintain financial integrity, attract necessary capital, fairly compensate investors for the risk they assume, and protect relevant public interest.⁶⁹

Discussion

As accurately pointed out by Staff,⁷⁰ this issue is purely one of balancing the interests of the ratepayer vis-à-vis the company. Under Staff's view, the company will lose that portion of its investment attributed to Staff's disallowance, but a large portion of this loss can be recovered as more lots are sold.

Staff's position is based on the actual capacity of the facilities. The company's position is based on DNR allowing the company, given its facilities, to serve a certain number of customers. No party disagrees with the actual capacities that Staff offers.

Given these capacities, it is clear that DNR's permit is its statement that these facilities will serve 210 customers. This does not forego a conclusion that the facilities can serve more than 210 customers. For instance, given the capacity of the storage tank, 244 customers can be served.

DNR's permit does not speak to maximum capacity but only to the number of customers the company requests to serve and therefore has no bearing on the issue of a capacity adjustment. The actual capacity of the facilities is, however, directly relevant. It is the company that chose the equipment. DNR's requirement is only that the equipment be able to serve the number of customers planned for the subdivision.

The excess capacity shall be calculated consistent with Staff's position.

Should the capacity adjustment to rate base be recorded as plant held for future use?

This question has to do with how to treat the adjustments discussed above. It is purely a question of accounting and what the Commission's rules require. Findings of fact are unnecessary.

Conclusions of Law

1. The Commission's rules⁷¹ require the use of the Uniform System of Accounts.
2. The Uniform System of Accounts exclude from Property Held for Future Use, "materials and supplies, meters held in reserve, or normal spare capacity of plant in service. . . ."⁷²

⁶⁹ *State ex re. Union Electric Co. v. Public Service Comm.* 765 SW2d 618, 625 (Mo. App. E. D. 1988).

⁷⁰ Staff's post-hearing brief, page 20.

⁷¹ 4 CSR 240-50.030 and 4 CSR 240-61.020.

⁷² Ferguson Rebuttal (Staff 3), Schedule LMF-2.

Discussion

This is a question of law. The Commission need not make any findings of fact to resolve this issue. In its brief, the company posits that the Commission need not follow the Uniform System of Accounts.⁷³ The statute⁷⁴ the company references may give the Commission the authority to determine how accounts are kept. However, through its rule, the Commission must require that accounts be kept in a manner that is consistent with the Uniform System of Accounts. Because it is noted in the Uniform System of Accounts that excess capacity not be kept in the account title "Property Held for Future Use", then capacity adjustment for rate base shall not be held in Plant Held for Future Use.

What is the appropriate depreciation rate for the company's submersible pumping equipment account on the Bennington system?

This issue has to do with the difference between Staff and OPC's methodology. OPC would depreciate items individually. Staff includes similar items in an account, then depreciates the account.

Findings of Fact

56. The plant account 325.1 for LCSW includes the pumping equipment at both Bennington and Rockport and is comprised of the piping through to the distribution system, valves, flow measurement, pressure transmission or pressure transmitter and associated electrical systems.⁷⁵

57. Staff does not look at individual pieces within an account. Rather, Staff looks at the dollars of the account.⁷⁶

58. The depreciation expense is intended to reflect the average annual consumption of all the dollars in the account.⁷⁷

59. Because there is a lack of sufficient recorded data to support a depreciation study, Staff has depreciation rate schedules that are recommended for water and sewer companies by the Uniform System of Accounts.⁷⁸

60. Within the pumping equipment account is a pump for the Bennington system.⁷⁹

61. The Bennington pump has exceeded the life span of the account.⁸⁰

62. The current rate of depreciation on this account is 10%.⁸¹

63. To account for the Bennington pump, Staff is recommending a decrease to a 6.6% depreciation rate for the pumping equipment account for Lincoln County Water.⁸²

⁷³ See Lincoln County Sewer & Water, LLC's Brief, page 37.

⁷⁴ Section 393.140(8) RSMo.

⁷⁵ Transcript; page 228, lines 3-13

⁷⁶ Transcript; page 229, lines 7-9.

⁷⁸ Transcript; page 235.

⁷⁸ Transcript; page 230, line 25 – page 231, line 3; Rice Surrebuttal (Staff 9), pages 3-4.

⁷⁹ Transcript; page 228, lines 19-22.

⁸⁰ Transcript; page 232, lines 4-21.

⁸¹ Rice Surrebuttal (Staff 9), lines 4-5.

⁸² Transcript; page 231, lines 22-24.

Conclusion of Law

1. The Conclusions of Law set out above are controlling for this discussion.

Discussion

Both the company and Staff agree on this issue. Public Counsel's position hinges on the legal argument that it is the company's burden to show that depreciation should be included in rates. Public Counsel is correct that in the absence of any evidence, the company does not prevail on the issue because it has the burden of proof.

The standard of proof in Commission cases is a preponderance of the evidence. The Commission considers all evidence presented by the parties.

The Commission has before it evidence concerning depreciation. This evidence was presented by the Staff of the Commission. Under Public Counsel's reasoning, the Commission must ignore this evidence because it is the company, not Staff, who has the burden of proof. The party bearing the burden of proof risks losing if the necessary evidence is not offered. Staff's evidence, however, is before the Commission and will be considered.

Staff asserts that the submersible pump is in an account with other items that serve a similar purpose. The whole account is then depreciated. Because the submersible pump is fully depreciated, the account has been depreciated too quickly. Staff has therefore adjusted the depreciation rate from 10% to 6.6%. The question before the Commission is what the appropriate depreciation rate should be. OPC posits that the depreciation rate for the submersible pump should be set at zero. This ignores the fact that the pump is depreciated along with other items in an account. Staff's suggested depreciation rate of 6.6% is reasonable in that it is consistent with the current method of depreciating accounts containing similar assets rather than depreciating individual assets.

The appropriate depreciation rate for the company's submersible pumping equipment account on the Bennington system is 6.6%

Should the Commission order adjustments to the accumulated depreciation for the Bennington submersible pump account?

Staff and OPC's approaches to this question are different. OPC's answer reflects its position that the submersible pump should be depreciated as a single item. Staff discusses how the pump was damaged and that the cost of removal was not accounted for. To adopt OPC's position would be inconsistent with discussion about depreciation.

Findings of Fact

64. The book entries for the replacement of a submersible pump in January of 2010 resulting from a lightning strike failed to account for cost of removal.⁸³

65. The total labor and materials cost of the replacement was recorded as the new, additional plant in service.⁸⁴

66. An adjustment is necessary to correct the books going forward.⁸⁵

⁸³ Rice Surrebuttal, (Staff 9), page 10, lines 6-7.

⁸⁴ Rice Surrebuttal (Staff 9), page 10, lines 7-8

⁸⁵ Rice Surrebuttal (Staff 9), page 10, lines 9-10.

67. Staff's recommended adjustment is \$1000 as cost of removal.⁸⁶

68. OPC's adjustment is based on its understanding that items should be depreciated individually, not by account with related items having different lives.⁸⁷

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

Consistent with Staff's treatment of depreciation with small sewer and water companies, an adjustment which accounts for the cost of removal is appropriate. OPC's suggested adjustment is inconsistent with how items are depreciated with small companies.

What is the appropriate amount of rate case expense to include in the company's rates?

Although this issue is broadly framed, it has only to do with whether to include the attorney's fees of James Burlison, a second attorney whose participation OPC opines as unnecessary.

Findings of Fact

69. Dean Cooper entered his appearance in this case on July 9, 2013.⁸⁸

70. Invoices made available to Public Counsel as of September 25, 2013, show a rate case expense of \$6,116.⁸⁹

71. As of October 24, 2013 Staff has received invoices of \$11,751 for rate case expense.⁹⁰

72. James Burlison entered his appearance in this case on November 4, 2013.⁹¹

73. The hearing date for the evidentiary hearing in this case was on November 5, 2013.

74. There will be additional cost associated with the evidentiary hearing and the post hearing process.⁹²

Discussion

The issue in this case has to do with the inclusion of costs specific to a second attorney (James Burlison) participating during the evidentiary hearing. Public Counsel posits that this attorney's participation was unnecessary and that rate payers should not have to bear the burden of associated costs.

⁸⁶ Rice Surrebuttal (Staff 9), page 10, line 10-11.

⁸⁷ Addo Rebuttal (OPC 2), page 41, line 16 to page 42, line 6.

⁸⁸ Docket, EFIS Item No. 10.

⁸⁹ Addo Rebuttal (OPC 2), page 32, lines 4-6.

⁹⁰ Hanneken Surrebuttal (Staff 2) page 12, line 22 to page 13, line 2.

⁹¹ Docket, EFIS Item No. 45.

⁹² Hanneken Surrebuttal (Staff 2) page 13, line 5-8

Public Counsel points out that Mr. Burlison questioned only one witness during the hearing and that this was an effort to justify his appearance. Although Staff has concerns about the company's use of two attorneys, Staff agrees that the company should be able to recover its costs.

Because the costs are unknown, there is no evidence before the Commission that would allow the Commission to specifically resolve the issue of "the appropriate amount of rate case expense to include in rates". However, the underlying question is whether the costs associated with the participation of Mr. Burlison should be included in rate case expense. Because we view Mr. Burlison's participation in this case as reasonable, it is reasonable that his costs shall be included in rates.

**What is the appropriate amount of costs related to the company's
certificate case to include in the company's rate case?**

Findings of Fact

75. Company witness Johansen is not an accountant.⁹³

76. Public Counsels' witness, Addo and Staff's witness Hanneken are both accountants.

Conclusion of Law

1. The Conclusions of Law set out above are controlling for this discussion.

Discussion

The company's witness, Johansen, argues that costs incurred during the certificate cases should be included in rate case expense. In support of his position he states that these costs should be included as "Intangible Plant" and held in account 302 of the Uniform System of Accounts, which states:

This account shall include amounts paid to the federal government, to a state or to a political subdivision thereof in consideration for franchises, consent, or certificates . . . together with necessary and reasonable expenses incident to procuring such . . . certificates of permission and approval . . ."

Both Hanneken and Addo disagree with Johansen. They are both accountants. Johansen is not an accountant. An interpretation of the USOA by two accountants outweighs such by a non-accountant.

The company shall not include in rates the costs associated with the certificate cases.

⁹³ Transcript; page 189, lines 3-5.

What is the appropriate amount of expense to include in rates for the company's office space, including rent and utilities?

Findings of Fact

77. The company pays \$950/month for office space.⁹⁴
78. The company also pays additional expenses including; homeowners' association fees, water charges, electricity, mowing around the office and maintenance on the building including heating and cooling repairs.⁹⁵
79. It is not normal for a utility with 120 customers to pay what the additional expenses would cost; \$1,400/ month.⁹⁶
80. The company has requested to recover rent and utilities through rates, not the other, abnormal expenses.⁹⁷
81. The owner of the building is an affiliate of, or an organization that is controlled by, Mr. Kallash.⁹⁸
82. Mr. Kallash leases the office space, but the transaction was not made at arms-length.⁹⁹
83. Mr. Kallash owns Fitch & Associates.¹⁰⁰
84. Fitch & Associates has paid the taxes on the office space property.¹⁰¹
85. Staff based is recommended rental expense of \$600/month on available office space in the Troy, Missouri area.¹⁰²
86. For utilities, Staff added \$900 for a total of \$8,100 annually.¹⁰³
87. Public Counsel's estimate of rent, of \$7,018, is also based on average rent in Troy, Missouri.¹⁰⁴
88. In its assessment, Public Counsel makes a disallowance for some of the office space because it is not being used.¹⁰⁵
89. The area reflected in OPC's disallowance of \$1,140 is 121.83 square feet.¹⁰⁶
90. The office space that OPC disallowed will be used for filing cabinets and storage of plat and utility maps with the utility's certificated territory.¹⁰⁷

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

⁹⁴ Transcript; page 199, lines 3-6.

⁹⁵ Transcript; page 199, lines 7-14.

⁹⁶ Transcript; page 199, line 23 – page 200, line 2.

⁹⁷ Transcript; page 201, lines 12-18.

⁹⁸ Transcript; page 299, line 19 – page 300, line 10; pages 314 - 325.

⁹⁹ Transcript; page 306 – page 310.

¹⁰⁰ Transcript, page 322, lines 1-2.

¹⁰¹ Commission Exhibit 2.

¹⁰² Boateng Surrebuttal (Staff 7), page 5, lines 4-9.

¹⁰³ Addo Surrebuttal (Staff 7), page 5, lines 5-6.

¹⁰⁴ Addo Rebuttal (OPC 2) page 5, lines 2-3; Boeteng Surrebuttal (Staff 7), page 5, line 11.

¹⁰⁵ Addo Rebuttal (OPC 2), page 8, line 13 - page 9, line 4.

¹⁰⁶ Addo Rebuttal (OPC 2), page 8, lines 10-12.

¹⁰⁷ Addo Rebuttal (OPC 2), page 8, lines 14-21.

Discussion

The company's real estate transaction, with regard to renting its office space, calls into the question the reasonableness of the rent it pays. The transaction and the responsibility over the maintenance indicate that Mr. Kallash controls the property. Both Staff and OPC have based their evaluations on what the market reflects. Because it has determined that some of the space is not being used, OPC, however, has disallowed a portion of its estimate.

Although the Commission does not find any malfeasance on the part of Mr. Kallash, he does have some control over the amount of rent he pays. In light of information from Staff and OPC regarding the rental market, it would be unreasonable for the LCSW's customer to pay for what is comparatively inflated rent.

Through its investigation, OPC found that there is a 10ft x 12ft area of the building that is not being used and therefore opines that costs associated with this space should be excluded from rates. Upon inquiry the company informs OPC finds that the space is intended for filing cabinets and storage of plat and utility maps for its certificated territory.

The area that OPC is concerned about is 121.83 square feet or 10ft x 12ft. Although OPC's suggestion is scientifically sound, it would be unreasonable from a practical standpoint for the company to have found a space that is 10ft x 12ft smaller. With regard to the company's actual rent, LCSW's lease was not entered into at arm's length and Staff and OPC's recommendation are only \$58 apart if OPC disallowance is included. That both Staff and OPC arrived at similar results regarding rental cost in that area further support the veracity of their respective conclusions. However, given OPC's impractical disallowance of a portion of the office space, Staff's recommended allowance of \$8,100 annually is reasonable.

Is it appropriate to include income tax expense in the Company's cost of service?

Findings of Fact

91. The company does not pay income tax. The profit/loss is recorded on the owner's personal tax.¹⁰⁸

92. The company does not incur tax liability.¹⁰⁹

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

Because tax expense is reflected in the owner's personal income tax, it is unreasonable to include income tax expense in the company's cost of service.

¹⁰⁸ Transcript, page 266, line 23 – page 267, line 6.

¹⁰⁹ Transcript, page 266, line 23 – page 267, line 6.

**What is the appropriate level of salary to include in rates for
Dennis Kallash?**

Findings of Fact

93. For 16 years Mr. Kallash has performed functions such as responding to service-related customer calls, performing the required water sampling, performing inspections of new customer connections, monitoring the operation of the sewer and water systems, reading the water meters, ordering field supplies and installing water meters. He is also the company contact person for dealing with the Commission and the Department of Natural Resources.¹¹⁰

94. Based on a review of available regional wage information from 2012 for experienced “general and operations managers” and the CPI-W data for June 2013, Mr. Kallash should be paid at an hourly rate of \$39.65.¹¹¹

95. Mr. Kallash spends 11.5 hours/week performing services with the sewer and water company.¹¹²

96. The Staff of the Commission is unable to determine the number of hours Mr. Kallash spends time working with the sewer and water company.¹¹³

97. There are no paid employees working with the company.¹¹⁴

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

The Staff of the Commission was unable to determine the number of hours Mr. Kallash works. Although the company proposes a monthly average of 87 hours, evidence submitted by the company shows that in October of 2012, Mr. Kallash worked 3 hours on the 10th, 2 hours on the 14th and 6.5 hours on the 15th. This is 11.5 hours in a week’s time. This weekly average amounts to 598 hours per year.

With regard to his rate of pay, both Staff and OPC’s suggested salaries are based on the salary used to determine rates during the certificate case. There is, however, no basis for the rate set at that time. The rate suggested by the company is based on the CPI-W data for June 2013 and available wage data information from 2012 for “general and operations managers”, which is reasonably descriptive of the work performed by Mr. Kallash. The company suggests an hourly wage of \$39.65. The company further suggests that this amount be increased to \$42.68 to include a payroll tax, as if Mr. Kallash was paid as an employee. The Commission has determined that there are no paid employees working for the company and that inclusion of a payroll tax in salaries unreasonable.

The evidence supports an hourly wage of \$39.65 for Mr. Kallash at 598 hours per year; or, \$23,710.70 annually.

¹¹⁰ Johansen Direct (LCSW 1), page 10, line 20 to page 21, line 4.

¹¹¹ Johansen Direct (LCSW 1), page 11, lines 9-11.

¹¹² Kallash Surrebuttal (LCSW 4), Schedule DK-4S.

¹¹³ Transcript; pages 275-293.

¹¹⁴ Ferguson Rebuttal (Staff 3), page 18, lines 5-6.

**What is the appropriate level of salary to include in rates for
Toni Kallash?**

Findings of Fact

98. Ms. Kallash performs functions such as producing customer bills, picking up and depositing customer payments, answering customer calls, monitoring the company's answering machine, meeting with new applicants, general bookkeeping, purchasing office supplies and dealing with title companies on property transfers.¹¹⁵

99. For October of 2012, Ms. Kallash booked 31.66 hours.¹¹⁶

100. For November of 2012, Ms. Kallash booked 17 hours.¹¹⁷

101. For December of 2012, when the company filed for a rate increase, Ms. Kallash booked 83.25 hours.¹¹⁸

102. For January of 2013, Ms. Kallash booked 80 hours.¹¹⁹

103. For February of 2013, Ms. Kallash booked 81 hours.¹²⁰

104. For March of 2013, with 3-7 hours booked almost daily at the bank, Ms. Kallash booked 101 hours.¹²¹

105. Based on a review of available regional wage information from 2012 and the CPI-W data for June 2013, for the services performed by Ms. Kallash, an hourly rate of \$15.34 is appropriate.¹²²

106. Inclusion of the billing program will require 12 fewer hours per month for payroll expense of office personnel.¹²³

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

As with Mr. Kallash, the company offers support for its suggested hourly wage of \$15.34 for Ms. Kallash. This wage, at the company's proposed 87 hours per month, results in an annual salary expense of \$16,015. Staff proposes an annual salary of \$10,562 for Ms. Kallash and bases this amount on the number of hours it believes Ms. Kallash works at an average hourly rate of \$13.37 as supported by MERIC (Missouri Economic Research & Information Center). OPC suggests an annual salary of \$6,592, based on the salary included in rates during the certificate case, with an increase factored in due to an increase in customers.

¹¹⁵ Johansen Direct (LCSW 1), page 9, lines 11-15.

¹¹⁶ Addo Rebuttal (OPC 2), page 23, lines 12-13.

¹¹⁷ Addo Rebuttal (OPC 2), page 23, line 13.

¹¹⁸ Addo Rebuttal (OPC 2), page 23, lines 14-15.

¹¹⁹ Addo Rebuttal (OPC 2), page 23, lines 16-17.

¹²⁰ Addo Rebuttal (OPC 2), page 23, line 18.

¹²¹ Addo Rebuttal (OPC 2), page 24, lines 1-3.

¹²² Johansen Direct (LCSW 1), page 10, lines 4-7.

¹²³ Johansen Direct (LCSW 1), page 7, lines 20-22.

Although their resulting rates vary, both Staff and the company base their suggested hourly wages on MERIC. Staff uses the hours for October 2012 through March 2013 to arrive an annual compensation for Ms. Kallash. For the months of October 2012 through March of 2013, Ms. Kallash worked an average 65.65 hours/month. As pointed out by OPC, the hours dramatically increase in December of 2012, when the company filed this rate increase request. And, in March of 2013, unusually long hours were booked as time spent at the bank. Nevertheless, these are the hours Staff averaged to arrive at its suggested annual salary.

The company proposes an annual salary based on 87 monthly hours. This amount is greater than any monthly amount noted in the months between October 2012 and February 2013. March is booked with 101 hours. The Company's proposed hours are greater than the number of hours supported by the record. On the other hand, Staff has averaged hours from October of 2012 to March 2013. The numbers from December through March are inexplicably much higher than those from October and November. Further, even between October and November the hours decrease from 31 to 17.

The Commission is satisfied that the company has carried its burden with regard to an hourly rate of \$15.34 for Ms. Kallash. With regard to the number of monthly hours Ms. Kallash works, Staff presents the only reasonable suggestion by averaging the hours that are in evidence. However, as pointed out by OPC, the month of March includes an inordinate number of hours spent at the bank. It is therefore reasonable to exclude the month of March from the sample of hours that are in evidence. This results in a monthly average of 58.58 hours. At \$15.34 per hour, Ms. Kallash's annual salary shall be \$10,783.77.00.

What is the appropriate amount of expense to include in rates for vehicle mileage?

Findings of Fact

107. For a total of 892.8 miles, Ms. Kallash makes 144 annual trips, at 6.2 miles per trip, from the company's office to the bank.¹²⁴

108. The federal reimbursement rate for business mileage is \$.565/mile.¹²⁵

109. Mr. Kallash makes an average of 14 monthly master meter reading trips with four miscellaneous trips to serve both the Bennington and Rockport systems.¹²⁶

110. Mr. Kallash travels 4552.21 annual miles.¹²⁷

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

¹²⁴ Johansen Direct (LCSW 1), page 16, line 12 to page 17, line 5.

¹²⁵ <http://www.irs.gov/uac/Newsroom/2013-Standard-Mileage-Rates-Up-1-Cent-per-Mile-for-Business,-Medical-and-Moving>

¹²⁶ Johansen Direct (LCSW 1), page 16, line 12 to page 17, line 5.

¹²⁷ Johansen Direct (LCSW 1), page 16, line 12 – page 17, line 5.

Discussion

Given the federal reimbursement rate for mileage and the number of miles traveled annually by Mr. and Ms. Kallash, the amounts to be included in rates for mileage are: \$2,572 for Mr. Kallash and \$504 for Ms. Kallash.

What is the appropriate amount of expense to include in rates for water testing?

- 111. The Department of Natural Resources annual fee for each system is \$200.¹²⁸
- 112. An additional amount of \$360/year is appropriate as a management fee.¹²⁹

Conclusion of Law

The Conclusions of Law set out above are controlling on this discussion.

Discussion

Given the cost of \$200 per system for the DNR annual fee and an additional amount of \$360/year as a management fee, the appropriate amount of expense to include in rates for water testing is \$760/year.

What is the appropriate amount of expense to include in rates for sludge hauling?

- 113. The Company pays \$.14/gallon for sludge hauling.¹³⁰
- 114. A three-year average for sludge hauling is \$2,958.¹³¹
- 115. The company has not received any DNR violations.¹³²

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

Staff's position is based on a three-year average for sludge hauling; which is reflective of the company's expenses. The company seeks to include in this cost, expenses associated with additional maintenance suggested by ESA, Inc.¹³³ During its 16 years in operation, the company has not been cited for any violations from the Department of Natural Resources. In light of this, the necessity for additional maintenance is not supported.

Based on the company's historical costs, an appropriate amount of expense to include in rates for sludge hauling is \$2,958.

¹²⁸ Ferguson Rebuttal (Staff 3), page 23, lines 1-5.

¹²⁹ Johansen Direct (LCSW 1), page 17, lines 17-18.

¹³⁰ Ferguson Rebuttal (Staff 3), page 20, lines 15-16.

¹³¹ Ferguson Rebuttal (Staff 3), pages 20-21; Hanneken Surrebuttal, pages 18-19.

¹³² Transcript; page 177, lines 13-15.

¹³³ See Schedule DWJ-2S, Johansen Surrebuttal (LCSW 2).

What is the appropriate amount of expense to include in rates for office supplies and postage in regard to the mailing for the Consumer Confidence Report?

116. This expense has to do with a required DNR consumer confidence report.¹³⁴
117. The report must be made available to customers annually.¹³⁵
118. LCSW, being a small company, is not required to mail the report to customers but must only make it available to customers.¹³⁶
119. If the company chooses to mail the report to customers, the report can be mailed with a monthly billing statement.¹³⁷
120. The cost of additional paper and ink to produce the Consumer Confidence Report is \$192.¹³⁸

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

Staff asserts that the report can be mailed with a monthly billing statement, with no additional postage required. This is reasonable. The company will, however, incur additional cost of printing at \$192/year. It is just and reasonable to include this expense in rates.

What is the appropriate amount of revenue to include in rates for late fees?

121. Staff's results for annualized late fees are: \$252 each for Bennington water and sewer, and \$816 each for Rockport water and sewer.¹³⁹
122. Rates in Missouri are based on a historical test year.¹⁴⁰
123. The matching principle requires that all expenses and revenues of the same time period be weighed in order to determine rates.¹⁴¹
124. The company has not provided updated numbers necessitating any changes in late fees while adhering to the matching principle.¹⁴²

¹³⁴ Transcript, page 21, lines 3-7.

¹³⁵ Ferguson Rebuttal (Staff 3), page 27, lines 11-12.

¹³⁶ Transcript, page 21, lines 13-17.

¹³⁷ Ferguson Rebuttal (Staff 3), page 27-28.

¹³⁸ Ferguson Rebuttal (Staff 3), page 28, lines 6-7.

¹³⁹ Ferguson Rebuttal (Staff 3), page 25, lines 21-23.

¹⁴⁰ Transcript, page 214, lines 13-15.

¹⁴¹ Transcript, page 217, line 3 to page 218, line 3.

¹⁴² Transcript, page 216, lines 5-12.

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

Staff's position is based on historical costs. The company asserts that a change in the number of customers should be considered in determining late fees. Because all revenues and expenses must be considered during the same time period, thus the purpose of a test year, Staff's position is just and reasonable. The appropriate amount of late fees to be considered in rates are as Staff suggests: \$252 each for Bennington water and sewer, and \$816 each for Rockport water and sewer.

What is the appropriate amount of expense to include in rates for telephone and internet usage?

125. The actual cost of telephone and internet usage is \$128.65/month.¹⁴³
126. The company's telephone and internet provider is CenturyLink.¹⁴⁴
127. The company's actual, annual cost for telephone and internet usage is \$1,543.80.
128. The landline package from CenturyLink is the basic and least expensive package.¹⁴⁵
129. Staff has annualized \$899 for telephone and internet usage.¹⁴⁶

Conclusion of Law

The Conclusions of Law set out above are controlling for this discussion.

Discussion

The company seeks to have its actual costs included in rates. Staff's position, which OPC supports, is based on Staff inquiring into what it believes the telephone/internet plan should be. Staff's contention is that telephone and internet service should be less than what the company is spending. The evidence shows that the company acted reasonably when choosing telephone and internet service. It is an expense that is being incurred and will be included in rates at annual amount of \$1,543.80.

THE COMMISSION ORDERS THAT:

1. The company shall file tariffs consistent with this Report and Order.
2. This Report and Order shall become effective on May 2, 2014.

R. Kenney, Chm., Stoll, W. Kenney, and Hall, CC., concur,
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 2nd day of April, 2014.

¹⁴³ Johansen Surrebuttal (LCSW 2), Schedule DWJ-5S.

¹⁴⁴ Transcript, page 220, lines 16-17.

¹⁴⁵ Transcript, page 221, lines 23-24.

¹⁴⁶ Addo Rebuttal (OPC 2), page 37; Ferguson Rebuttal (Staff3), pages 23-24.

In the Matter of the Application of Missouri Gas Energy,)
 a Division of Laclede Gas Company, for a Certificate)
 of Public Convenience and Necessity Authorizing It to)
 Construct, Install, Own, Operate, Control, Manage and) **File No. GA-2014-0232**
 Maintain a Natural Gas Distribution System to Provide)
 Gas Service in Lawrence County, Missouri, as an)
 Expansion of Its Existing Certified Area)

GAS §3. Certificate of convenience and necessity. §24. Accounting. The Commission granted a gas company's application to expand its service area but prescribed the account in which the company must record any cost for main line extension exceeding the customer contribution.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: April 16, 2014

Effective Date: April 26, 2014

On February 19, 2014, Missouri Gas Energy ("MGE"), a division of Laclede Gas Company, filed an application requesting that the Missouri Public Service Commission ("Commission") grant it a Certificate of Convenience and Necessity to expand its service territory into Section 9, Township 26 North, Range 28 West in Lawrence County, Missouri.¹

The CCN would permit MGE to provide service to an additional business in that area that has expressed interest in obtaining natural gas service.

The Commission issued notice and set a deadline for intervention requests. No person or entity intervened, and no party requested a hearing. On March 31, 2014, the Commission's Staff filed its recommendation, which was amended on April 4, 2014, to grant the CCN subject to the following conditions:

1. That MGE record the actual cost of the main line extension that exceeds the customer contribution as plant held for future use in Account 105;
2. That MGE file revised tariff sheets reflecting the CCN within thirty days of the Commission order approving the application; and
3. That the Commission's order should state that it makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the granting of the requested certificate in any later rate proceeding, including expenditures by MGE.

The Commission directed MGE to respond to the conditions in the Staff recommendation, and MGE has not objected to the recommended conditions.

¹ MGE filed its application pursuant to Section 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 3.205.

MGE is a “gas corporation” and a “public utility” as defined in Subsections 386.020(18) and (43), RSMo Supp. 2013. It is subject to the jurisdiction of this Commission under Chapters 386 and 393, RSMo 2000. A gas corporation may not exercise any right under a franchise without first obtaining the permission and approval of this Commission.² The Commission may give permission and approval when it has determined after due hearing³ that such construction or the exercise of such right under a determined after due hearing³ that such construction or the exercise of such right under a franchise is “necessary or convenient for the public service.”⁴ The Commission may also impose such conditions as it deems reasonable and necessary upon its grant of permission and approval.⁵

The Commission has articulated the filing requirements for gas utility CCNs in Commission Rule 4 CSR 240-3.205, and the specific criteria to be used when evaluating applications of gas utility CCNs are more clearly set out in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.⁶

The Commission’s Staff recommended approval of MGE’s application because: (1) MGE will provide the requested service under its existing tariff provisions; (2) the extension of gas service does not jeopardize natural gas service to MGE’s current customers; (3) no persons have intervened or objected; (4) MGE anticipates using customary rights-of-way; (5) the requested service area is expected to develop new customers; and (6) no new franchises are necessary. MGE’s verified application demonstrates a need for natural gas service in the service area identified.

Based on the Commission’s independent and impartial review of the verified filings, the Commission determines that MGE has satisfied all necessary criteria for the grant of a CCN. MGE’s provision of natural gas service to the service area described is in the public interest and the Commission will grant the request for the certificate. Since MGE has accepted Staff’s recommended conditions, and because the Commission finds the conditions to be in the public interest, the Commission will incorporate the conditions into the ordered paragraphs below.

² Section 393.170, 1 and 2, RSMo 2000.

³ The requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. No party requested a hearing in this matter; thus, no hearing is necessary. *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

⁴ Section 393.170.3, RSMo 2000.

⁵ *Id.*

⁶ Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

THE COMMISSION ORDERS THAT:

1. Missouri Gas Energy, a division of Laclede Gas Company, is granted a Certificate of Convenience and Necessity to expand its service territory into Section 9, Township 26 North, Range 28 West in Lawrence County, Missouri, as more specifically described in its application and subject to the conditions described in the body of this order.
2. Missouri Gas Energy, a division of Laclede Gas Company, shall record the actual cost of the main line extension that exceeds the customer contribution as plant held for future use in Account 105.
3. Missouri Gas Energy, a division of Laclede Gas Company, shall file revised tariff sheets including the newly certificated service area granted by this order within thirty (30) days of the issue date.
4. This order does not preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the granting of the requested certificate in any later rate proceeding, including expenditures by MGE.
5. This order shall become effective on April 26, 2014.
6. This file may be closed on April 27, 2014.

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Bushmann, Senior Regulatory Law Judge

In the Matter of Lake Region Water & Sewer	)	<u>File No. WR-2013-0461 et al.</u>
Company's Application to Implement a General	)	YW-2014-0024
Rate Increase in Water and Sewer Service	)	YS-2014-0023

SEWER. §14. Rates and revenues. The Commission excluded availability fees from a water and sewer company's rate base and revenues.

WATER. §16. Rates and revenues. The Commission excluded availability fees from a water and sewer company's rate base and revenues.

Issue Date: April 30, 2014

Effective Date: May 30, 2014

REPORT AND ORDER

APPEARANCES

APPEARING FOR LAKE REGION WATER & SEWER COMPANY:

Mark W. Comley, Newman, Comley & Ruth P.C., 600 Monroe Street, Suite 301, Post Office Box 537, Jefferson City, Missouri 65102.

APPEARING FOR THE OFFICE OF THE PUBLIC COUNSEL AND THE PUBLIC:

Christina Baker, Assistant Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.

APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:

Kevin A. Thompson, Chief Staff Counsel, **Amy Moore**, Deputy Counsel, and **Tim Optiz**, Legal Counsel, Governor Office Building, 200 Madison Street, Post Office Box 360, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Michael Bushmann, Senior Regulatory Law Judge

I. Procedural History

A. Tariff Filings, Notice, and Intervention

On July 16, 2013, Lake Region Water & Sewer Company ("Lake Region") filed tariff sheets designed to implement a general rate increase for utility service, which resulted in the Missouri Public Service Commission ("Commission") opening a separate case for both water and sewer, File Nos. WR-2013-0461 and SR-2013-0459. The two cases were subsequently consolidated into File No. WR-2013-0461. The tariff sheets bear an effective date of August 15, 2013. In order to allow sufficient time to study the effect of the tariff sheets and to determine if the rates established by those sheets are just, reasonable, and in the public interest, the tariff sheets were suspended until June 13, 2014. The Commission directed notice of the filings and set an intervention deadline, but no persons requested to intervene in this matter.

B. Test Year and True-Up

The test year is a central component in the ratemaking process. Rates are usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.¹ From these four factors is calculated the “revenue requirement,” which, in the context of rate setting, is the amount of revenue ratepayers must generate to pay the costs of producing the utility service they receive while yielding a reasonable rate of return to the investors.² A historical test year is used because the past expenses of a utility can be used as a basis for determining what rate is reasonable to be charged in the future.³

The parties agreed to, and the Commission adopted, a test year of twelve months ending on June 30, 2013. The Commission also established the true-up period, if one was required, to run through December 31, 2013, to reflect any significant and material impacts on Lake Region’s revenue requirement. The use of a true-up audit and hearing in ratemaking is a compromise between the use of a historical test year and the use of a projected or future test year.⁴ It involves adjustment of the historical test year figures for known and measurable subsequent or future changes.⁵ However, the true-up is generally limited to only those accounts necessarily affected by some significant known and measurable change, such as a new labor contract, a new tax rate, or the completion of a new capital asset. The true-up is a device employed to reduce regulatory lag, which is “the lapse of time between a change in revenue requirement and the reflection of that change in rates.”⁶

C. Local Public Hearing

On August 27, 2013, the parties filed a *Joint Proposed Procedural Schedule*, which included a recommendation for the date and location for a local public hearing to give Lake Region’s customers an opportunity to respond to the requested rate increase. The hearing was held at City Hall, in the City of Osage Beach, on December 11, 2013. No persons testified at the hearing, and no exhibits were offered or admitted into the record.⁷

D. Stipulations

On January 31, 2014, the parties jointly filed a *Joint Stipulation of Undisputed Facts*, which pertain primarily to the issue of availability fees. On February 5, 2014, the parties filed a *Joint Stipulation of Additional Material Undisputed Facts*, which included the parties’ agreements for rate design and revenue requirements. The Commission, having fully examined these stipulations and received them into the record of the hearing, will address the specific fact stipulations in its findings of facts and conclusions of law.

On February 11, 2014, the parties filed a *Unanimous Partial Stipulation and Agreement*. In this stipulation and agreement the parties agreed to the revenue requirements reflected in the Staff accounting schedules (attached thereto as Appendices A, B, and C), which were subsequently amended on March 14, 2014. The stipulation and agreement also resolved all but four of the remaining issues in dispute between the parties. The Commission found the stipulation and agreement to be reasonable and approved it on February 19, 2014 to become effective on March 21, 2014.

¹ *State ex rel. Union Electric Company v. Public Service Comm’n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

² *State ex rel. Capital City Water Co. v. Public Service Comm’n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

³ *See State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Comm’n*, 585 S.W.2d 41, 59 (Mo. banc 1979).

⁴ *St. ex rel. Missouri Public Service Comm’n v. Fraas*, 627 S.W.2d 882, 887-888 (Mo. App. 1981).

⁵ *Id.* at 888.

⁶ *In the Matter of St. Louis County Water Company*, Case No. WR-96-263 (*Report & Order*, issued December 31, 1996), at p. 8.

⁷ Transcript, Vol. IV.

On March 17, 2014, the parties filed a *Unanimous Partial Stipulation and Agreement as to True-Up Issues*. The stipulation and agreement resolved previously disputed true-up issues and was approved by the Commission on March 26, 2014 to become effective on April 5, 2014. The issues resolved in these two partial stipulations and agreements will not be addressed further in this report and order, except as they may relate to any unresolved issues.

E. Evidentiary Hearing

The evidentiary hearing was held on February 18, 2014.⁸ During the hearing, the parties presented evidence relating to the following four unresolved issues previously identified by the parties:

1. Availability fees:
Should availability fees collected from owners of undeveloped lots in Lake Region's service territory be classified as Lake Region revenue or applied against rate base?
2. Capital structure:
 - a) Should the capital structure for Lake Region be based on its actual capital structure or a hypothetical capital structure?
 - b) If the capital structure for Lake Region should be based on its actual capital structure, what is Lake Region's actual capital structure?
 - c) If the capital structure for Lake Region should be based on a hypothetical capital structure, what is a balanced and reasonable capital structure for Lake Region?
3. Return on equity:
What is the appropriate return on equity for Lake Region?
4. Legal fees:
 - a) Should the legal fees incurred during the test year for Shawnee Bend Development Company, LLC v. Lake Region Water & Sewer be included in the calculation of rates for Lake Region?
 - b) If so, what is the appropriate mechanism for recovery of these costs?

F. Case Submission

During the evidentiary hearing held on February 18, 2014 at the Commission's offices in Jefferson City, Missouri, the Commission admitted the testimony of 13 witnesses, received 28 exhibits into evidence, and took official notice of evidence from several prior Commission cases.⁹ Post-hearing briefs were filed according to the post-hearing procedural schedule. The final post-hearing briefs were filed on April 4, 2014, and the case was deemed submitted for the Commission's decision on that date.¹⁰

⁸ Transcript, Vol. VIII.

⁹ At the hearing, the regulatory law judge admitted the two joint stipulations of fact into the record and took official notice of the following: 1) all Commission orders issued in Lake Region's 2010 rate case, SR-2010-0110 and WR-2010-0111; 2) all admitted exhibits and hearing transcript pages referred to in the stipulations; 3) the following exhibits or other filings made in the 2010 rate case: Exhibits 43-48, Lake Region's reply to Staff's response to Request from Agenda on April 7, 2010, and Lake Region's response to May 19, 2010 Order of the Commission; 4) all filings made in the working dockets WW-2011-0043, SW-2011-0042, and WW-2009-0386; and 5) testimony from the CCN case, WA-95-164, including Martin Hummel and Gregory Meyer.

¹⁰ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

II. General Matters

A. General Findings of Fact

1. Lake Region Water & Sewer Company ("Lake Region") is a Missouri corporation in good standing with its principal office and place of business located at 62 Bittersweet Road, Lake Ozark, Missouri 65049. Lake Region possesses a certificate of convenience and necessity, issued by the Commission on December 27, 1973 in Mo PSC Case No. 17,954, to provide water and sewer service in Missouri. Lake Region is a water corporation pursuant to Section 386.020(59), RSMo Supp. 2013, a sewer corporation pursuant to Section 386.020(49), RSMo Supp. 2013, and, consequently, a public utility within the meaning of 386.020(43), RSMo Supp. 2013, and thereby subject to the jurisdiction of the Commission pursuant to Section 386.250(3) and (4), RSMo 2000.¹¹

2. The Office of the Public Counsel ("Public Counsel") is a party to this case pursuant to Section 386.710(2), RSMo 2000, and by Commission Rule 4 CSR 240-2.010(10).¹²

3. The Staff of the Missouri Public Service Commission ("Staff") is a party to this case pursuant to Section 386.071, RSMo 2000, and Commission Rule 4 CSR 240-2.010(10).¹³

4. Lake Region provides water service to approximately 658 customers and sewer service to approximately 635 customers in its Shawnee Bend service area; and sewer service to approximately 245 customers in its Horseshoe Bend service area.¹⁴

5. Lake Region's water system comprises: (1) two deep wells, each with a pumping capacity of 360,000 gallons per day; (2) a 200,000 gallon elevated water storage tank; and, (3) a total of approximately 96,847 feet of water mains.¹⁵

6. Lake Region's sewer system comprises: (1) seven sewage treatment plants: (a) Lodge, with a 326,500 gallon daily capacity, (b) Racquet Club, with a 292,500 gallon daily capacity, (c) Charleston Condominiums, with a 24,000 gallon daily capacity, (d) Shawnee Bend, with a 100,000 gallon daily capacity, (e) Grandview, with a 50,000 gallon daily capacity, (f) Maywood, with a 12,800 gallon daily capacity, and (g) Blackhawk, with a 1,387 gallon daily capacity; (2) multiple lift stations; and, (3) a total of approximately 8,924 feet of collecting sewers.¹⁶

7. The majority of Lake Region's customers are single family residential, but approximately 41% of Lake Region's revenues are derived from commercial and multi-family sewer customers located in the Horseshoe Bend service area.¹⁷

8. Lake Region's existing water and sewer rates are based on a report and order issued by the Commission in File Nos. SR-2010-0110 and WR-2010-0111, which became effective on September 6, 2010 (the "2010 rate case"). In that report and order, the Commission ordered Lake Region to file a new general rate increase request no later than three years following the effective date of the report and order.¹⁸

¹¹ *Joint Stipulation of Additional Material Undisputed Facts*, No. 1.

¹² *Joint Stipulation of Additional Material Undisputed Facts*, No. 3.

¹³ *Joint Stipulation of Additional Material Undisputed Facts*, No. 2.

¹⁴ *Joint Stipulation of Additional Material Undisputed Facts*, No. 4.

¹⁵ *Joint Stipulation of Additional Material Undisputed Facts*, No. 5.

¹⁶ *Joint Stipulation of Additional Material Undisputed Facts*, No. 6.

¹⁷ Lake Region Ex. 1, Summers Direct, p. 3.

¹⁸ *Id.*

9. The proposed tariffs filed by Lake Region in this case are designed to generate an aggregate revenue increase of approximately \$218,762, or 23%, which would affect all Lake Region customers.¹⁹

10. In order to determine the appropriate level of utility rates, the Commission must calculate a revenue requirement for Lake Region, which is the increase or decrease in revenue Lake Region needs in order to provide safe and reliable service, as measured using Lake Region's existing rates and cost of service.²⁰

11. The revenue requirement calculation can be identified by a formula as follows:²¹
Revenue Requirement = Cost of Providing Utility Service or $RR = O + (V - D) R$ where,

RR	=	Revenue Requirement;
O	=	Operating Costs; (such as fuel, payroll, maintenance, etc., Depreciation and Taxes);
V	=	Gross Valuation of Property Used for Providing Service;
D	=	Accumulated Depreciation Representing the Capital Recovery of Gross Property Investment.
(V - D)	=	Rate Base (Gross Property Investment less Accumulated Depreciation = Net Property Investment)
R	=	Overall Rate of Return or Weighted Cost of Capital
(V - D) R	=	Return Allowed on Net Property Investment

12. A test year is a historical year used as the starting point for determining the basis for adjustments that are necessary to reflect annual revenues and operating costs in calculating any shortfall or excess of earnings by the utility. Annualization and normalization adjustments are made to the test year results when the unadjusted results do not fairly represent the utility's most current annual level of existing revenue and operating costs.²²

13. The test year for this case is the twelve months ending June 30, 2013.²³

14. The Commission also selected a true-up period ending December 31, 2013, in order to account for any significant changes in Lake Region's cost of service that occurred after the end of the test year period but prior to the tariff operation of law date.²⁴

15. A normalization adjustment is an adjustment made to reflect normal, on-going operations of the utility. Revenues or costs that were incurred in the test year that are determined to be atypical or abnormal will get specific rate treatment and generally require some type of adjustment to reflect normal or typical operations. The ratemaking process removes abnormal or unusual events from the cost of service calculations and replaces those events with normal levels of revenues or costs.²⁵

16. An annualization adjustment is made when costs or revenues change during the audit period that will be ongoing at a level different than they existed during the audit period.²⁶

¹⁹ *Id.* at p. 4.

²⁰ Staff Ex. 3, Bolin Direct, p. 4

²¹ *Id.*

²² *Id.* at p. 5.

²³ *Id.*

²⁴ *Id.* at p. 6.

²⁵ *Id.* at p. 8.

²⁶ *Id.*

17. A cost of capital analysis must be performed to determine a fair rate of return on investment (rate base) used in the provision of utility service. Rate base represents the utility's net investment used in providing utility service.²⁷

18. The net income required for Lake Region is calculated by multiplying the rate of return by the rate base established as of June 30, 2013. The result represents net income required. Net income required is then compared to net income available from existing rates to determine the incremental change in Lake Region's rate revenues required to cover its operating costs and provide a fair return on investment used in providing utility service.²⁸

19. The Commission finds that any given witness's qualifications and overall credibility are not dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.²⁹

20. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.³⁰

B. General Conclusions of Law

Lake Region is a sewer corporation, a water corporation and a public utility as defined in Sections 386.020(49), 386.020(59), and 386.020(43), RSMo Supp. 2013, respectively, and as such is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. The Commission's subject matter jurisdiction over Lake Region's rate increase request is established under Section 393.150, RSMo 2000.

Sections 393.130 and 393.140, RSMo 2000, mandate that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable. Section 393.150.2 makes clear that at any hearing involving a requested rate increase the burden of proof to show the proposed increase is just and reasonable rests on the corporation seeking the rate increase. As the party requesting the rate increase, Lake Region bears the burden of proving that its proposed rate increase is just and reasonable. In order to carry its burden of proof, Lake Region must meet the preponderance of the evidence standard.³¹ In order to meet this standard, Lake Region must

²⁷ *Id.* at p. 6.

²⁸ *Id.*

²⁹ Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony". *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

³⁰ An administrative agency, as fact finder, also receives deference when choosing between conflicting evidence. *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

³¹ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

convince the Commission it is “more likely than not” that Lake Region’s proposed rate increase is just and reasonable.³²

In determining whether the rates proposed by Lake Region are just and reasonable, the Commission must balance the interests of the investor and the consumer.³³ In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held as follows:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.³⁴

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.³⁵

The Supreme Court has further indicated:

‘[R]egulation does not insure that the business shall produce net revenues.’ But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.^{36 v}

³² *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

³³ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).

³⁴ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

³⁵ *Bluefield*, at 692-93.

³⁶ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.³⁷

Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.³⁸

III. Disputed Issues

A. Availability Fees

Findings of Fact

Lake Region's Ownership and Certificate History

21. On August 10, 1971, Four Seasons Lakesites Water & Sewer Company ("Lakesites W&S") was incorporated to provide water and sewer service for the Four Seasons Lakesites, Inc. development.³⁹

22. On February 27, 1973, Four Seasons Lakesites Water & Sewer Company was issued a Permit of Approval from the Division of Health to supply water to the public.⁴⁰

23. The Commission granted Lakesites W&S its certificate of convenience and necessity ("CCN") to provide water service effective December 27, 1973 in Case No. 17,954. The Commission amended the company's certificate in Case No. 18,002 effective May 16, 1974, to expand its water service to areas immediately adjacent to the previously authorized certificated area.⁴¹

24. Ultimately, Lakesites W&S, or its successors-in-interest, received Commission approval for providing sewer service and to expand its certificated water and sewer service areas as follows:

- a. December 16, 1975: Effective date of Commission Order granting an expansion to Lakesites W&S's CCN. Case No. 18,416.
- b. March 14, 1980: Additional authority granted to Lakesites W&S in an unreported order. Case No. WA-79-266.

³⁷ *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

³⁸ *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).

³⁹ *Joint Stipulation of Undisputed Facts*, No. 1.

⁴⁰ *Joint Stipulation of Undisputed Facts*, No. 2.

⁴¹ *Joint Stipulation of Undisputed Facts*, No. 3.

- c. February 16, 1990: Additional authority granted to Lakesites W&S to provide sewer service in an unreported order. Case No. SA-89-135.
- d. July 11, 1997: Effective date for Commission order approving a Unanimous Stipulation to grant Lakesites W&S Company a CCN to extend its sewer operation to areas in Shawnee Bend and Horseshoe Bend and adjust water tariffs (depreciation schedules). The Company already had a CCN to provide sewer service in part of Horseshoe Bend. Case No. WA-95-164.
- e. October 9, 1998: Effective date for Commission order extending Four Seasons Water & Sewer Company's ("Four Seasons W&S") CCN for its sewer operations. Case No. SA-98-248.
- f. September 1, 2000: Effective date for Commission order granting Lake Region an extension of its CCN to provide water and sewer service in the Shawnee Bend area. Case No. SA-2000-295.
- g. November 5, 2006: Effective date of Commission order approving expansion of Lake Region's CCN. WA-2005-0463 and WA-2005-0464.⁴²

25. In the WA-95-164 CCN case, the Commission did not include availability fees in the ratemaking process for the Shawnee Bend area or in tariffs for Lakesites W&S to render service in that area.⁴³ A Staff witness in that case testified that "the Developer and the Company need to enter into a written agreement whereby the Developer assigns the right to the Company to bill and receive availability fees".⁴⁴

26. In March of 2004, the Commission denied Lake Region's requests for CCNs in Case Number SA-2004-0182.⁴⁵

27. In addition to the many certificate cases, Lakesites W&S, or its successors-in- interest, appeared before the Commission seeking rate increases in the following cases:

- a. April 16, 1975: Effective date for Commission order denying Lakesites W&S's tariff for an imposition of rates for unmetered service. Case No. 18,081.
- b. December 5, 1991: Effective date for Commission order granting Lakesites W&S a rate increase request pursuant to a unanimous agreement. Case No. WR-92-59.
- c. August 2, 1998: Effective date for Commission order granting Four Seasons W&S an increase in rates for its sewer service after the filing of a unanimous disposition agreement. This increase in rates involved the completed expansion at the Racquet Club wastewater treatment plant; Case No. SR-98-564.⁴⁶

⁴² *Joint Stipulation of Undisputed Facts*, No. 4.

⁴³ Transcript, Vol. VIII, p. 201, 218.

⁴⁴ In the Matter of the Application of Four Seasons Lakesites Water & Sewer Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain Water and Sewer Utility Properties for the Public Located in an Unincorporated Area in Camden County and Miller County, Missouri, Generally Comprising the Eastern Half of the Area Known as "Shawnee Bend", Case No. WA-95-164, Rebuttal Testimony of Gregory R. Meyer, p. 6.

⁴⁵ *Joint Stipulation of Undisputed Facts*, No. 5.

⁴⁶ *Joint Stipulation of Undisputed Facts*, No. 6.

28. With regard to ownership of the company:

- a. December 29, 1992: The Commission approved Lakesites W&S application to sell its water system on Horseshoe Bend to the Ozark Shores Water Company ("Ozark Shores"), but Lakesites W&S continued to provide sewer service to the Horseshoe Bend area. Unreported Case No. WM-93-24.
- b. October 9, 1998: Lakesites W&S changed its name to Four Seasons Water and Sewer Company ("Four Seasons W&S") in Case No. SA-98-248.
- c. May 16, 1999: The Commission recognized Four Seasons W&S's change of name to Lake Region Water & Sewer Company (Lake Region) in Case No. WO-99-469.⁴⁷

29. On December 2, 1969, Harold Koplar, the original developer of Four Seasons Lakesites, Inc., executed the original Declaration of Restrictive Covenants for the development that would eventually encompass Lake Region's service area.⁴⁸

30. On March 10, 1971, Harold Koplar, the original developer of Four Seasons Lakesites, Inc., executed the [First] Amended Declaration of Restrictive Covenants ("1st Covenants") for the development that would eventually encompass Lake Region's service area.⁴⁹

31. Article VI of the 1st Covenants establishes Four Seasons Lakesites Property Owners Association (Lakesites POA), and all property owners in the development automatically become a member in the Association when they purchase property.⁵⁰

32. Article VII of the 1st Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards.⁵¹

33. Articles VII and VIII of the 1st Covenants pertain to the central sewage disposal system and water works. These sections:

- a. establish a "minimum monthly availability charge for water, water service and the accommodations afforded the owners of said lots by said water works systems" that would commence when water service was available and continue regardless whether the property owner takes water service from the central system to be constructed within the development;
- b. allow for the construction of individual wells until such time as the central water system is constructed, after which the property owner must connect to the central system;
- c. establish "a minimum monthly availability charge for sewage disposal and treatment and the accommodations afforded the owners of said lots by said sewage disposal system" that would commence upon the availability for use of a sewage collection main that leads to an operating sewage treatment facility and continue regardless whether the property owner connects to the central sewage to be constructed within the development;
- d. allow for the construction of individual sewer systems, i.e. septic tanks and tile fields, until completion of the central sewer system, after which the property owner must connect to the central system;

⁴⁷ Joint Stipulation of Undisputed Facts, No. 7.

⁴⁸ Joint Stipulation of Undisputed Facts, No. 8.

⁴⁹ Joint Stipulation of Undisputed Facts, No. 9.

⁵⁰ Joint Stipulation of Undisputed Facts, No. 10.

⁵¹ Joint Stipulation of Undisputed Facts, No. 11.

- e. provide that no charge will be made to the lot owners for the right to connect to the water and/or sewer systems; and,
- f. provide that the owner or owners of the water works system and sewage disposal system will be a privately owned utility authorized by a CCN issued by the Commission and all availability charges, and times and methods of payment, shall be provided in schedules or rates and rules to be approved by the Commission.⁵²

34. Article VIII of the 1st Covenants further provides that the availability fees are to be paid to the owner or owners of the sewage disposal system and water works system and that any “unpaid [availability] charges shall become a lien on the lot or lots to which they are applicable as the date the same became due.”⁵³

35. In addition to agreeing to the restrictive covenants upon the purchase of an undeveloped lot, the owner of each lot executed a separate water and sewer agreement, the provisions of which mirrored those in the 1st Covenants.⁵⁴

36. On January 14, 1986, the Second Amended and Restated Declaration of Restrictive Covenants was executed by the developer of Four Seasons Lakesites, Inc.⁵⁵

37. On July 2, 1996, Peter N. Brown, successive developer for Four Seasons Lakesites, Inc., executed the Third Amended and Restated Declaration of Restrictive Covenants (3rd Covenants).⁵⁶

38. Article VII of the 3rd Covenants pertains to Lakesites POA. All property owners in the development automatically become a member in the Lakesites POA when they purchase property.⁵⁷

39. Article VIII of the 3rd Covenants prohibits the use of outside toilets and requires that sanitary waste disposal conform with the recommendations of the developer or its successors, the state and county health boards and the Missouri Department of Natural Resources (DNR).⁵⁸

40. Article IX(A) of the 3rd Covenants duplicates the provisions from prior declarations relating to the water system, but the water system only. This duplication includes the provisions concerning availability fees. This article includes the provision that owners of the water works system will be a privately owned utility authorized by a CCN issued by the Commission and all availability charges, and times and methods of payment thereof, shall be provided in schedules or rates and rules to be approved by the Commission, or if not so provided, as determined by the owner of the water works system.⁵⁹

41. Article IX(C) of the 3rd Covenants provides for a plan for sewage treatment by individual treatment facilities, which must meet the specifications of Lakesites POA’s DNR- approved plan or by “other methods of sewage treatment by the Development.” It also provides that Lakesites POA will periodically maintain each individual treatment facility and each lot owner is required to pay a monthly maintenance fee to the POA for administering the plan. The 3rd Covenants do not mention or require any availability fees for sewer service to be paid to the developer or to Four Seasons Lakesites Water & Sewer Company.⁶⁰

⁵² *Joint Stipulation of Undisputed Facts*, No. 12.

⁵³ *Joint Stipulation of Undisputed Facts*, No. 13.

⁵⁴ *Joint Stipulation of Undisputed Facts*, No. 14.

⁵⁵ *Joint Stipulation of Undisputed Facts*, No. 15.

⁵⁶ *Joint Stipulation of Undisputed Facts*, No. 16.

⁵⁷ *Joint Stipulation of Undisputed Facts*, No. 17.

⁵⁸ *Joint Stipulation of Undisputed Facts*, No. 18.

⁵⁹ *Joint Stipulation of Undisputed Facts*, No. 19.

⁶⁰ *Joint Stipulation of Undisputed Facts*, No. 20.

42. The "Development," for purposes of Article IX(C) of the 3rd Covenants, refers to the Horseshoe Bend lots.⁶¹

43. Article IX(E) of the 3rd Covenants provides that, barring certain exceptions, "all homes and other structures requiring sewage or waste water disposal facilities, shall conform to the plan for sewage treatment; no such home or structure may be occupied unless so connected to the sewage treatment facility and no septic tank, cesspool or other means of disposal of sewage on an individual lot may be used in the subdivisions."⁶²

44. There are multiple amendments to the 3rd Covenants.⁶³

45. The amendment to the 3rd Covenants executed on July 23, 2009 contains specific provisions regarding the water and sewer systems.⁶⁴

46. Article IX in July 23, 2009 amendment removes and replaces the entire Article IX from the 3rd Covenants, and provides, *inter alia*:

- a. Shawnee Bend Lot Owners must "pay the owner of the central water system, or its assigns or designees, a monthly availability charge of Ten Dollars (\$10.00), unless the Owner of the Lot is contractually obligated to Developer, or Developer's assign to pay a different amount;"
- b. The water availability fee for Shawnee Bend Lot Owners commences upon the availability of water in a water system distribution main provided for the Lot and terminates when the Owner of the Lot connects his Lot to the water distribution main.
- c. Unpaid water availability fees become a lien on the Lot the date they become due.
- d. Shawnee Bend Lot Owners must "pay the owner of the central sewer system, or its assigns or designees, a monthly availability charge of Fifteen Dollars (\$15.00), unless the Owner of the Lot is contractually obligated to Developer, or Developer's assign to pay a different amount."
- e. Horseshoe Bend Lot Owners must pay the owner of the water works system a minimum monthly availability charge (amount not specified).
- f. The Owner of the Horseshoe Bend water works system will be a privately owned public utility authorized by a certificate of public convenience and necessity issued by the Commission to operate the water works system.
- g. The availability fees charged for the Horseshoe Bend Water System shall be provided in the Schedules of Rate and Rules. Regulations and conditions for water services shall be approved by the Commission (or any successor) and if not so provided will be determined by the owner of the water works.
- h. Unpaid sewer fees for maintenance, owed to Lakesites POA, become a lien on the Lot and may be enforced by the Association.
- i. The water and sewer amendment shall survive the execution and recording of the Fourth Amended and Restated Declaration and shall remain in full force and effect and be incorporated into the Fourth Amended and Restated Declaration.⁶⁵

⁶¹ Joint Stipulation of Undisputed Facts, No. 21.

⁶² Joint Stipulation of Undisputed Facts, No. 22.

⁶³ Joint Stipulation of Undisputed Facts, No. 23.

⁶⁴ Joint Stipulation of Undisputed Facts, No. 24.

⁶⁵ Joint Stipulation of Undisputed Facts, No. 25.

47. All references to regulation by the Commission in the 3rd Covenants apply to the Horseshoe Bend Water System, which is not at issue in this case since this system was sold and became Ozark Shores Water Company in 1992.⁶⁶

48. On October 1, 2009, the Fourth Amended and Restated Declaration of Restrictive Covenants ("4th Covenants") was executed by Peter Brown, Vice-President of Four Seasons Lakesites, Inc.⁶⁷

49. Article 9 of the 4th Covenants states that all provisions relating to the water and sewer systems and treatment are set forth in the Amendment to the 3rd Covenants dated July 22, 2009 (executed July 23, 2009).⁶⁸

50. Recital E in the 4th Covenants indicates the Declarant Developer may amend the Declaration at any time until all the lots in development have been sold.⁶⁹

51. All of the lots developed by Four Seasons Lakesites, Inc. on Shawnee Bend have been sold.⁷⁰

52. Section 19.3 of the 4th Covenants allows the property owners to seek amendment of the Declaration subject to certain conditions. Those conditions include:

- a. The Declaration is binding until January 15, 2015, after which it is automatically renewed unless the owners of 90% of the lots vote to terminate the Declaration.
- b. The Declaration may be amended at any time by the Developer at the request or with the consent of the Board until such time as all lots are sold, at which such time the Declaration may be amended by the affirmative vote of two-thirds of the owners of all of the lots entitled to vote.
- c. In the case of amendment by two-thirds of the property owners the amendment shall be executed by the requisite lot owners or the Lakesites POA.⁷¹

53. The 4th Covenants constitute an agreement between Peter N. Brown, successive developer for Four Seasons Lakesites, Inc., and the property owner. It also creates obligations between the property owner and Lakesites POA.⁷²

54. Lake Region is not a party to any of the restrictive covenants that establish the availability fees.⁷³

55. The 3rd and 4th Covenants do not represent that the Commission would determine or tariff rates for availability fees.⁷⁴

56. With respect to the water systems, the 3rd and 4th Covenants provide that if the Commission does not provide or approve regulations and conditions for services, they will be determined by the owner of the system.⁷⁵

57. The specimen land sales contract utilized by Four Seasons Lakesites, Inc. also contains provisions regarding the charging of availability fees. Paragraph 9 (B) and (C) provide:

- a. all lots in the development will be served by a central water system;
- b. the buyer agrees to pay availability fees until the central water system is completed to the point that a main water line runs in front of the buyer's property;

⁶⁶ *Joint Stipulation of Undisputed Facts*, No. 26.

⁶⁷ *Joint Stipulation of Undisputed Facts*, No. 27.

⁶⁸ *Joint Stipulation of Undisputed Facts*, No. 28.

⁶⁹ *Joint Stipulation of Undisputed Facts*, No. 29.

⁷⁰ *Joint Stipulation of Undisputed Facts*, No. 30.

⁷¹ *Joint Stipulation of Undisputed Facts*, No. 31.

⁷² *Joint Stipulation of Undisputed Facts*, No. 32.

⁷³ Transcript, Vol. VIII, p. 235.

⁷⁴ *Joint Stipulation of Undisputed Facts*, No. 33.

⁷⁵ *Joint Stipulation of Undisputed Facts*, No. 34.

- c. the availability fee for water is \$10.00 per month;
- d. the availability fee for water shall be paid to the seller or the seller's assignee, Lake Region Water & Sewer Co.;
- e. the buyer agrees to pay all cost for connecting buyer's home to the central water system;
- f. all lots in the development will be served by a central sewer system;
- g. the buyer agrees to pay a monthly availability fee to the seller or seller's assignee until such time as the buyer constructs a home on the property; and,
- h. once the buyer constructs a home, the buyer shall pay the sewer system operator a one-time connection fee and monthly fee for sewer service.⁷⁶

Purpose of Availability Fees

58. In Commission Case Number 17,954, the original certification case, the Commission received into evidence an engineering report and the testimony of James W. French, registered professional engineer.⁷⁷

59. The engineering report and testimony demonstrate that the economic feasibility of constructing the water and sewer system for what would ultimately become the service area for Lake Region was dependent upon the use of availability fees charged to the purchasers of the undeveloped lots.⁷⁸

60. A copy of a separate availability fee agreement is attached to the engineering report. The availability fee agreement contains provisions mirroring the terms for water and sewer service outlined in the 1st Covenants.⁷⁹

61. The Commission's Report and Order in Case No. 17,954, effective December 27, 1973, ("1973 Order") granting Four Seasons Lake Sites Water and Sewer Company (Lake Region's predecessor in interest) its CCN for water service, acknowledges the use of availability fees and distinguishes the agreement for those charges from the rates and charges proposed for rendering metered and unmetered water service.⁸⁰

62. The 1973 Order requires Lake Region's predecessor in interest to file tariffs including the rates for metered and unmetered water service. The Commission's order does not require the tariffing of availability fees.⁸¹

63. The collection of availability fees, by the terms and timing of the original agreements, began prior to construction or completion of the water and sewer systems and were collected to make construction of the systems feasible.⁸²

64. The purpose for establishing the availability fees was to recover the investment in the water and sewer systems, not to maintain or repair the existing operations of the systems once they were constructed.⁸³

⁷⁶ Joint Stipulation of Undisputed Facts, No. 35.

⁷⁷ Joint Stipulation of Undisputed Facts, No. 36.

⁷⁸ Joint Stipulation of Undisputed Facts, No. 37.

⁷⁹ Joint Stipulation of Undisputed Facts, No. 38.

⁸⁰ Joint Stipulation of Undisputed Facts, No. 39.

⁸¹ Joint Stipulation of Undisputed Facts, No. 40.

⁸² Joint Stipulation of Undisputed Facts, No. 41.

⁸³ Joint Stipulation of Undisputed Facts, No. 42.

65. The cost of that plant investment incurred by the developer has been treated as a contribution in aid of construction (“CIAC”) and subtracted from the rate base upon which the company earns a return for ratemaking purposes. The amount of that plant investment donated by the developer associated with the availability fees is approximately \$5.3 million.⁸⁴

66. Lake Region witness Larry R. Summers testified credibly that by his calculations it would take more than 45 years to recoup the developer’s investment of \$5.3 million through the use of availability fees.⁸⁵

67. People who purchase lots who are subject to paying the availability fees receive a benefit from paying the availability fees. That primary benefit is access to required utility service, in this instance potable water and sewage treatment, without having to sustain additional costs of installing a well or a septic system. A secondary benefit for paying the fees is the avoidance of having a lien placed on the property by operation of the terms of the land sales contract or the restrictive covenants. Having the infrastructure in place also facilitates the sale of lots by complying with deed restrictions.⁸⁶

Assignment or Transfer of Ownership of the Availability Fees

68. On August 17, 1998, Four Seasons Lakesites, Inc. assigned the availability fees to Roy and Cindy Slates.⁸⁷

69. The 1998 and 1999 Annual Reports to the Commission for Four Seasons Water & Sewer Co. confirm that the company’s stock was also transferred to the Slates.⁸⁸

70. Following the August 17, 1998 assignment, neither Four Seasons Group, Inc. nor Four Seasons Lakesites, Inc. were involved with the billing or collection of availability fees assessed to the properties in Lake Region’s service areas.⁸⁹

71. On July 27, 1999, Lake Region filed its Annual Report with the Commission for the year ending December 31, 1998. Availability fees are listed as “other income” and total \$52,648. This is consistent with timing of the assignment of the fees to the Slates. The 1998 Annual Report was the last year availability fees were reported to the Commission.⁹⁰

72. On April 12, 2000, Roy and Cindy Slates assigned the availability fees to Lake Region Water & Sewer Company.⁹¹

73. On April 12, 2000, Lake Region Water & Sewer Company assigned the availability fees to Waldo I. Morris.⁹²

74. On October 13, 2004, Waldo I. Morris (President of Lake Region Water & Sewer Co.) and Robert P. Schwermann and Sally J. Stump executed a “Contract Regarding Availability Fees” (“Fee Contract”).⁹³

75. Part of the Fee Contract included consummating and closing a Stock Purchase Agreement (dated September 10, 2004) in which Robert P. Schwermann and Sally J. Stump purchased all of the stock in Lake Region for three million dollars.⁹⁴

⁸⁴ Lake Region Ex. 2, Summers Rebuttal, p. 9.

⁸⁵ *Id.*

⁸⁶ *Joint Stipulation of Undisputed Facts*, No. 43.

⁸⁷ *Joint Stipulation of Undisputed Facts*, No. 44.

⁸⁸ *Joint Stipulation of Undisputed Facts*, No. 45.

⁸⁹ *Joint Stipulation of Undisputed Facts*, No. 46.

⁹⁰ *Joint Stipulation of Undisputed Facts*, No. 47.

⁹¹ *Joint Stipulation of Undisputed Facts*, No. 48.

⁹² *Joint Stipulation of Undisputed Facts*, No. 49.

⁹³ *Joint Stipulation of Undisputed Facts*, No. 50.

⁹⁴ *Joint Stipulation of Undisputed Facts*, No. 51.

76. The Fee Contract was accompanied by a separate “Assignment of Availability Fees” agreement specifying that for the amount of \$1.00, and “other good and valuable consideration,” Mr. Morris assigned the availability fees to Robert P. Schwermann and Sally J. Stump.⁹⁵

77. Robert P. Schwermann and Sally J. Stump hold the availability fees as tenants in common.⁹⁶

78. On October 8, 2003, a lawsuit was initiated by Four Seasons Lakesites, Inc., contesting the ownership of the property rights for the availability fees; Civil Case No. CV103-760CC. The defendants in that lawsuit included Lake Region and Roy and Cindy Slates, and Waldo Morris, the former owners of Lake Region. On April 15, 2005, a confidential settlement was reached regarding who owned the property rights to the fees. This settlement included the assignment of availability fees from Waldo Morris to Robert P. Schwermann and Sally Stump. Sally J. Stump and RPS Properties, L.P. received the right to collect the availability fees as a result of that settlement; however, terms were put in place as to which party received what portion of the availability fees.⁹⁷

79. Four Seasons Lakesites, Inc. holds a security interest in RPS Properties, L.P.’s and Sally Stump’s availability fees as defined in the Collateral Assignment and Security Agreement dated April 15, 2005 and the Availability Fee Assessment rights as defined in the Collateral Assignment and Security Agreement dated April 15, 2005. This security interest includes all accounts, accounts receivable, payment intangibles, contract rights, chattel paper, instruments and documents and notes; all proceeds relating thereto; and all of the foregoing, which are related to or arising from such Availability Fees and the Availability Fee Assessment Rights.⁹⁸

Collection and Amount of Availability Fees

80. According to the terms of the sales contract and the restrictive covenants for Four Seasons Lakesites, Inc. availability fees are levied on the owners of undeveloped lots. Once lots are developed, the owner of the property must connect to the water and sewage systems and availability fees are no longer charged once the connection is made and water and sewer service are being provided.⁹⁹

81. Availability fees are not paid by Lake Region’s water and sewer service customers.¹⁰⁰

82. Lake Region must provide service to any property owner requesting service within Lake Region’s service area, even if the property owner does not pay or is in arrears on paying the availability fees.¹⁰¹

83. The number of annual bills for availability fees will vary while lots are sold and developed and will continue to vary annually until all lots are sold and developed.¹⁰²

84. The actual amount of availability fees collected will vary based upon the property owners fulfilling their obligation to pay.¹⁰³

⁹⁵ *Joint Stipulation of Undisputed Facts*, No. 52.

⁹⁶ *Joint Stipulation of Undisputed Facts*, No. 53.

⁹⁷ *Joint Stipulation of Undisputed Facts*, No. 54.

⁹⁸ *Joint Stipulation of Undisputed Facts*, No. 55.

⁹⁹ *Joint Stipulation of Undisputed Facts*, No. 56.

¹⁰⁰ *Joint Stipulation of Undisputed Facts*, No. 57.

¹⁰¹ *Joint Stipulation of Undisputed Facts*, No. 58.

¹⁰² *Joint Stipulation of Undisputed Facts*, No. 59.

¹⁰³ *Joint Stipulation of Undisputed Facts*, No. 60.

85. The actual amount of availability fees collected annually will vary based upon when the property owners pay the fees.¹⁰⁴

86. Depending on how quickly property owners develop their lots, some may pay availability fees for a very small number of months and some may pay the fees for years.¹⁰⁵

87. The availability fee income that was reported to the Commission appears on line F-42 of the Annual Reports for "Other Income and Deductions."¹⁰⁶

88. Since the sale of Lake Region's stock and the assignment of availability fees to Robert P. Schwermann and Sally J. Stump, and the settlement agreement executed in Civil Case No. CV103-760CC, Sally J. Stump and RPS Properties, L.P. have the right to collect the availability fees.¹⁰⁷

89. RPS Properties, L.P. and Sally Stump d/b/a Lake Utility Availability 1 bills for and collects "availability fees" from land owners of undeveloped lots within the service area of the Lake Region. Lake Utility Availability 1 is a fictitious name registered with the Missouri Secretary of State.¹⁰⁸

90. Management fees for RPS Properties, L.P. and Vernon Stump are paid into the same account in which the availability fees are deposited. That account is titled Lake Utility Availability Fees and is owned by RPS Properties and Sally Stump.¹⁰⁹

91. Billing statements for the availability fees bear the caption "Lake Utility Availability" and display the same address and phone number as a copy of a customer bill for water and sewer service from Lake Region.¹¹⁰

92. Cynthia Goldsby is currently a billing clerk employed by Camden County Public Water Supply District Number 4.¹¹¹

93. Ms. Goldsby's hourly wage is paid by Camden County PWSD4 and is \$14.44.¹¹²

94. As part of Ms. Goldsby's job responsibilities, she provides billing and collection services for Lake Region.¹¹³

95. Also as part of Ms. Goldsby's job responsibilities, she handles billing and collection of the availability fees, but in a 2010 sworn affidavit she stated she did not have information sufficient to state with certainty that the billing and collection of availability fees was on behalf of RPS Properties or some other entity or entities.¹¹⁴

96. RPS Properties, L.P. makes no payments for Ms. Goldsby's services. RPS Properties, L.P. makes no payments to the Camden County PWSD4 for Ms. Goldsby's services.¹¹⁵

97. Ms Goldsby currently sends bills for annual availability fees to 1,322 individuals or entities owning Shawnee Bend properties.¹¹⁶

¹⁰⁴ Joint Stipulation of Undisputed Facts, No. 61.

¹⁰⁵ Joint Stipulation of Undisputed Facts, No. 62.

¹⁰⁶ Joint Stipulation of Undisputed Facts, No. 63.

¹⁰⁷ Joint Stipulation of Undisputed Facts, No. 64.

¹⁰⁸ Joint Stipulation of Undisputed Facts, No. 65.

¹⁰⁹ Joint Stipulation of Undisputed Facts, No. 66.

¹¹⁰ Joint Stipulation of Undisputed Facts, No. 67.

¹¹¹ Joint Stipulation of Undisputed Facts, No. 68.

¹¹² Joint Stipulation of Undisputed Facts, No. 69.

¹¹³ Joint Stipulation of Undisputed Facts, No. 70.

¹¹⁴ Joint Stipulation of Undisputed Facts, No. 71.

¹¹⁵ Joint Stipulation of Undisputed Facts, No. 72.

¹¹⁶ Joint Stipulation of Undisputed Facts, No. 73.

98. The annual availability fees for both water and sewer for each entity billed is \$300.¹¹⁷

99. RPS Properties, L.P. and Sally Stump began collecting availability fees in 2005, but they retain only a portion of the availability fees pursuant to the April 15, 2005 settlement agreement in Civil Case No. CV103-760CC.¹¹⁸ The availability fees are currently divided among RPS Properties, L.P., Sally Stump, and Four Seasons Lakesites, Inc. pursuant to the terms of that settlement agreement.¹¹⁹

Historical Treatment of Availability Fees

100. The Commission has had a number of cases come before it in the past that have dealt with issues concerning availability fees. Those issues involved determinations regarding whether the fees constitute regulated utility services and how to treat the revenue derived from fees.¹²⁰

101. In Case No. WR-92-59, where Lakesites Water & Sewer Company (Lake Region's predecessor) sought an increase in rates, the availability fees were removed from the general revenue stream and the rate base was reduced a certain amount as an offset for the reduction in general revenue related to the availability fees. This case was settled with a unanimous agreement from the parties that the Commission approved.¹²¹

102. In Case No. WR-99-193, where Ozark Shores sought an increase in rates, the parties agreed to add availability fees into the general revenue stream of the company and add additional rate base to the company as an offset. The availability fees are included in utility rates and are not tarified. This case was settled with a unanimous agreement from the parties that the Commission approved.¹²²

103. Peaceful Valley Service Company, a wholly owned subsidiary of Peaceful Valley Property Owners Association, collects availability charges as general revenue to reserve access to its water service and the fees are tarified. Peaceful Valley's tariff provision applies to availability charges that are generated through a contract between the property owner and the company, or from a contract between a property owner and a developer that was assigned to the utility company. The treatment of the availability fees stemmed from a unanimous agreement from the parties that the Commission approved.¹²³

104. I.H. Utilities formerly collected availability fees as general revenue and these charges were tarified in rates. The fees originated in a contract between the developer and the property owner that was later assigned to the company. I.H. Utilities no longer collects the fees and they are no longer tarified in rates.¹²⁴

105. Lake Region is the only water or sewer utility regulated by the Commission that has not treated availability fees as utility revenue.¹²⁵

¹¹⁷ *Joint Stipulation of Undisputed Facts*, No. 74.

¹¹⁸ *Joint Stipulation of Undisputed Facts*, No. 75.

¹¹⁹ Transcript, Vol. VIII, p. 213.

¹²⁰ *Joint Stipulation of Undisputed Facts*, No. 76.

¹²¹ *Joint Stipulation of Undisputed Facts*, No. 77.

¹²² *Joint Stipulation of Undisputed Facts*, No. 78.

¹²³ *Joint Stipulation of Undisputed Facts*, No. 79.

¹²⁴ *Joint Stipulation of Undisputed Facts*, No. 80.

¹²⁵ Transcript, Vol. VIII, p. 308-9, 318.

106. The Commission's Staff has been aware of the availability fees being charged to the property owners in the Shawnee Bend area since Commission Case No. WA-95-164, the certificate case for Lake Region's predecessor.¹²⁶

107. Lake Region does not collect availability fees or book those fees into any of its accounts.¹²⁷ Those fees have never been included in Lake Region's tariffs.¹²⁸

108. Lake Region annual reports provided to the Commission from approximately 1974-1998 that mention availability fees are not accurate because data is missing from some reports. The reports also fail to distinguish between the Shawnee Bend and Horseshoe Bend areas, including areas currently served by Ozark Shores and not involved in this case.¹²⁹

109. Lake Region has provided good service to its customers and is not a problem company.¹³⁰

The 2010 rate case

110. In the last rate case for Lake Region Water and Sewer Company, the Commission issued its Report and Order on August 18, 2010.¹³¹ The 2010 Lake Region rate case involved the presentation of evidence relating to availability fees, and the Report and Order, which was approved by the Commission, considered whether it had jurisdiction over the availability fees and how to treat those fees in light of the Commission's history of previous actions.

111. To determine its jurisdiction, the Commission examined the definition of utility "service" in Section 386.020(48), RSMo Supp. 2013.¹³² The Commission concluded that availability fees could be construed to be a "commodity" under the definition of "service" and that it should assert jurisdiction over those fees. However, the Commission noted that such a determination would be a substantial departure from past Commission decisions, policy and practice and was contrary to Staff's expert testimony. It is important to note that the Commission stopped short of making a specific finding of fact or conclusion of law that availability fees are a commodity.¹³³

¹²⁶ *Joint Stipulation of Undisputed Facts*, No. 81.

¹²⁷ Transcript, Vol. VIII, p. 233.

¹²⁸ Transcript, Vol. VIII, p. 288-89.

¹²⁹ Transcript, Vol. VIII, p. 252-53, 330.

¹³⁰ Transcript, Vol. VIII, p. 301-2.

¹³¹ In the Matter of Lake Region Water & Sewer Company's Application to Implement a General Rate Increase in Water and Sewer Service, File Nos. WR-2010-0111 and SR-2010-0110, *Report and Order*, issued August 18, 2010.

¹³² "Service" includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons".

¹³³ See, *Order Regarding Motions for Rehearing, Motion for Reconsideration and Request for Clarification*, p. 2, File Nos. WR-2010-0111 and SR-2010-0110, issued September 1, 2010.

112. In looking at the Commission's history in relation to availability fees in the 2010 Report and Order, the Commission found that for over 37 years it had treated Lake Region's fees as not being a utility service and not within its jurisdiction, regulation or control. The Commission concluded that it would be inappropriate to change its previous interpretation in an adjudicated order and that such a major policy shift should occur instead through the process of administrative rulemaking.¹³⁴ The availability fees were not imputed as revenue to Lake Region in that 2010 Report and Order.

113. The Commission subsequently opened workshop dockets on August 23, 2010 in File Nos. WW-2011-0043 and SW-2011-0042, in order to explore options for the ratemaking treatment of availability fees and formalize a proper policy in a later rulemaking.¹³⁵ No formal action was taken in those matters until June 16, 2011 when the Commission consolidated the workshop dockets with another more general proceeding, File No. WW-2009-0386, which had been instituted to investigate solutions to problems facing small water and sewer companies.¹³⁶ Staff received comments and conducted workshops and meetings with interested parties on a number of topics, but ultimately consensus was not reached on most issues and nothing was proposed to address availability fees.¹³⁷ The Commission closed the file on January 23, 2013, and no action has since been taken to initiate proposed rulemaking regarding availability fees.¹³⁸

114. The 2010 Report and Order required Lake Region to file a new rate case within three years from that previous order. In compliance with that order, Lake Region has now filed the current rate case that is before the Commission. On November 15, 2013, Staff filed direct testimony asserting that estimated availability fees should be imputed to Lake Region as revenue when calculating the company's revenue requirement.¹³⁹ The Office of Public Counsel filed direct testimony alleging that availability fees should be considered as contributions in aid of construction and included as an offset to Lake Region's rate base.¹⁴⁰ Thus, the Commission is now presented in this case with the same availability fee issue that it considered in the 2010 rate case.

¹³⁴ Report and Order, WR-2010-0111 and SR-2010-0110, at p.105-106.

¹³⁵ In the Matter of a Working Case to Investigate Appropriate Methods for Ratemaking Treatment of Fees or Other Mechanisms Used for Capital Recovery of Sewer and Water Infrastructure Investment, File Nos. SW-2011-0042 and WW-2011-0043, *Order Directing Notice of Working Case and Directing Filing*, issued August 23, 2010.

¹³⁶ In the Matter of a Working Case to Investigate Solutions to Problems Facing Small Water and Sewer Public Utilities, File No. WW-2009-0386, *Order Consolidating Investigations*, issued June 16, 2011.

¹³⁷ Lake Region Ex. 2, Summers Rebuttal, p. 2-4.

¹³⁸ In the Matter of a Working Case to Investigate Solutions to Problems Facing Small Water and Sewer Public Utilities, File No. WW-2009-0386, *Order Granting Motion to Close File*, issued January 23, 2013; Transcript, Vol. VIII, p. 278.

¹³⁹ Staff Ex. 3, Bolin Direct, p. 13; Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 14-16.

¹⁴⁰ OPC Ex. 2, Robertson Direct, p. 3-8.

Conclusions of Law and Decision

Lake Region objections to Staff and Public Counsel availability fee evidence

As a preliminary matter with regard to the issue of availability fees, the Commission must first rule on evidentiary objections by Lake Region to portions of Staff and OPC's witness testimony and exhibits that mention availability fees.¹⁴¹ During the hearing, the regulatory law judge reserved a ruling on those objections and stated that the Commission would take the objections with the case. Lake Region's arguments supporting the objections were filed previously in Lake Region's evidentiary motions.¹⁴² Therefore, the initial issue for determination is whether to sustain or overrule those objections.

Lake Region's position is that availability fees are beyond the jurisdiction of the Commission, so any evidence regarding those fees should be excluded from the record because it is irrelevant to the case. The parties in this case (except for Staff) and the 2010 Report and Order have all based their arguments regarding jurisdiction on the definition of "service" in Section 386.020(48), RSMo Supp. 2013. However, it is not necessary or even relevant to consider the meaning of "service".

The words in Section 386.020 are just definitions and do not confer or deny any authority by themselves. To be pertinent here, the word "service" must be used in a statute that relates to the Commission's jurisdiction or statutory authority. Lake Region argues that "service" is important because it appears in Section 386.250(6), RSMo 2000, which states that:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(6) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service. All such proposed rules shall be filed with the secretary of state and published in the Missouri Register as provided in chapter 536, and a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule;

This statute gives the Commission the authority to promulgate administrative rules relating to utility service. However, the Commission has not adopted any rules regarding availability fees and is not attempting to do so in this case. Promulgating a rule describing how a utility service should be rendered is different than considering a source of revenue when setting utility rates. Therefore, this statutory provision is not relevant here, and the Commission need not analyze the definition of "service" in determining its jurisdiction.

¹⁴¹ Transcript, Vol. VIII, p. 221-225; 264; 319-321; 347-348; 352; *Lake Region Water & Sewer Company's Objections to Hearing Exhibits*, filed March 6, 2014.

¹⁴² On November 22, 2013, Lake Region filed a *Motion to Strike Portions of the Written Testimony of Staff Witness Kim Bolin and Sections of Staff's Revenue Requirement and Cost of Service Report*, a *Motion to Strike Portions of the Written Testimony of Ted Robertson, Witness for the Office of Public Counsel*, and a *Motion in Limine*. These evidentiary motions were in response to the direct testimony filed by Staff and OPC and contend that: 1) the Commission does not have jurisdiction over availability fees, 2) it is unlawful to impute those fees as revenue to Lake Region without a definitive administrative rule, 3) evidence pertaining to the fees is irrelevant because the previous report and order concluded that those fees should not be considered imputed revenue to Lake Region, 4) certain references to availability fees in the testimony filed by Staff and OPC should be stricken, and 5) Staff and OPC should be barred from conducting further discovery or presenting any evidence at a hearing regarding availability fees. The Commission denied the motions on December 18, 2013 because they were premature and directed that any objections be made during the hearing.

The Commission has personal jurisdiction over Lake Region because it is a water and sewer corporation and a public utility.¹⁴³ The Commission has subject matter jurisdiction because Lake Region filed a rate case.¹⁴⁴ Consequently, the Commission's jurisdiction is clear, and the only real question is whether the Commission has the statutory authority to consider the availability fees in determining whether Lake Region's proposed rate increase is just and reasonable. In deciding whether the rate proposed is appropriate, the Commission can consider any facts it determines to be relevant.¹⁴⁵ Moreover, Missouri's prohibition against single-issue ratemaking bars the Commission from allowing a public utility to change an existing rate without consideration of all relevant factors, such as operating expenses, revenues, and rates of return.¹⁴⁶ Lake Region's revenue is relevant to its rate case, and whether the availability fees were included as part of Lake Region's revenue prior to 1998 is one of the disputed facts in this case. So, the Commission has statutory authority to consider whether Lake Region's revenue included availability fees in the past and, if so, whether such revenue should be imputed to Lake Region in the future in setting Lake Region's rates.

Lake Region also argues that the Commission's promulgation of an administrative rule regarding availability fees is a condition precedent to the Commission's consideration of those fees. Since no such rule has been proposed or adopted, Lake Region asserts that the Commission does not have the jurisdiction to consider availability fees in this case. This argument is not persuasive. Based on the evidentiary record in the 2010 Rate Case, the Commission concluded at that time that asserting jurisdiction over availability fees would constitute a prospective "statement of general applicability that implements, interprets, or prescribes law or policy".¹⁴⁷ However, the Commission must now make a determination based on the evidentiary record presented in this case, which is similar, but not identical to, the record in the 2010 Rate Case.¹⁴⁸ The preponderance of the evidence in this case indicates that resolving the issue of availability fees does not involve enacting general policy for all water and sewer companies. Lake Region's situation is unique in that the availability fees were assigned to other entities or persons and not provided to the utility for maintenance or repairs. There is evidence in the record that, unlike Lake Region, three other utilities which have or had availability fees retained that revenue with the utility and did not assign it. Since Lake Region's situation can be distinguished from those other utilities, an order resolving this particular availability fee issue applies only to this specific fact situation. Based

¹⁴³ *Joint Stipulation of Additional Material Undisputed Facts*, No. 1.

¹⁴⁴ See, Sections 393.140(11) and 393.150, RSMo 2000.

¹⁴⁵ Section 393.270.4, RSMo 2000.

¹⁴⁶ *State ex rel. Mo. Water Co. v. Public Service Commission*, 308 S.W.2d 704, 718-19 (Mo. 1957); *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56-58 (Mo. banc 1979).

¹⁴⁷ Report and Order, WR-2010-0111 and SR-2010-0110, at p.104; See, Section 536.010(6), RSMo Supp. 2013.

¹⁴⁸ In addition, an administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts. *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003). The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision. *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980).

on the record of this case, the appropriate action is an adjudication rather than rulemaking.¹⁴⁹ The Commission concludes that it has the statutory authority to consider availability fees and that the evidence presented at the hearing is relevant to resolving that issue through adjudication. Therefore, the Commission will overrule Lake Region's objections to the availability fee evidence presented in the hearing.

Treatment of availability fees

The Commission must determine whether availability fees collected from owners of undeveloped lots in Lake Region's service territory should be classified as Lake Region revenue or applied against rate base. Staff's position is that availability fees collected going forward should be imputed as revenue to Lake Region, although Lake Region does not currently receive any of those funds. Public Counsel asserts that availability fees should be applied against rate base as contributions in aid of construction. Lake Region opposes both of these positions.

Staff has proposed two arguments why the availability fees should be imputed as revenue to Lake Region. First, Staff alleged in its pre-filed testimony and during the hearing that the assignment of the availability fee revenue in 1998 to shareholders of the company by Lake Region was imprudent. Second, Staff states that the assignment of availability fees to shareholders in 1998 constituted an illegal act that is void as a matter of law because it was not approved by the Commission. Staff alleges that the assignment violated Section 393.190.1, RSMo 2000, which prohibits a water or sewer corporation from selling or assigning "any part of its franchise, works or system" without Commission approval.¹⁵⁰ Both arguments are based on the assumption that Lake Region received or had use of the availability fees at the time of the assignment.

As the party requesting the rate increase, Lake Region bears the burden of proving that its proposed rate increase is just and reasonable.¹⁵¹ The issue of availability fees was first introduced into the case when Staff and Public Counsel submitted testimony concerning that issue after Lake Region filed its proposed tariff and direct testimony. Since these assertions concerning availability fees do not involve an element of Lake Region's case, but rather present a new issue not depending on the truth of Lake Region's allegations, Staff and Public Counsel's arguments are analogous to an affirmative defense, such as fraud or illegality.¹⁵²

¹⁴⁹ In contrast to a rule, an adjudication is "[a]n agency decision which acts on a specific set of accrued facts and concludes only them." *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004).

¹⁵⁰ This theory was not previously identified as an issue by the parties, and Lake Region was not provided an opportunity to present any evidence on it, which it was entitled to do as a matter of due process. However, because of the Commission's ultimate decision on this issue the Commission will address the substance of Staff's argument.

¹⁵¹ Section 393.150.2, RSMo 2000.

¹⁵² Mo. Sup. Ct. R. 55.08 states "[i]n pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation." (emphasis added) See also, Black's Law Dictionary (6th ed. 1990), which defines affirmative defense as a "matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it."

As the parties asserting that availability fees should be included in the determination of Lake Region's rates, Staff and Public Counsel bear the burden of producing evidence to support those allegations.¹⁵³

There is evidence that it was the developer's intent when the restrictive land covenants were created in the 1970s that those availability fees would be paid to a water and sewer company certificated by the Commission and included in approved rates, but those fees were never included in Lake Region's rates. The annual reports provided to the Commission from approximately 1974-1998 that mention availability fees are not accurate because data is missing from some reports and are not reliable because the reports fail to distinguish between the Shawnee Bend and Horseshoe Bend areas, including areas currently served by Ozark Shores and not involved in this case. There is an indication that Lake Region's predecessor may have received availability fees in 1992¹⁵⁴, but Staff and Public Counsel did not explore this further or present any evidence on this point. Staff alleges that the assignment of the availability fee revenue to the Lake Region shareholders was imprudent, but presented no evidence about the specific details of the assignment, the reasons for or against that action, why the assignment was improper, or how it resulted in harm to the ratepayers. There is support in the record for Lake Region's position that Lake Region did not receive any availability fees at the time of the assignment in 1998. A fact stipulated by all the parties stated that in 1998 the developer, not Lake Region, assigned the availability fees to the shareholders of Lake Region.¹⁵⁵ If Lake Region had been receiving the availability fees at that time, it should have at least been a party to the assignment.

Even assuming that Lake Region's predecessor did receive availability fees prior to 1998, there was no evidence presented concerning the company's use of availability fees during the early years before the assignment, other than the one stipulated fact that "the purpose for establishing the availability fees was to recover the investment in the water and sewer systems, not to maintain or repair the existing operations of the systems once they were constructed".¹⁵⁶ If Lake Region's predecessor received the availability fee revenue prior to 1998, it is unclear whether the company had the full use of those funds for utility purposes or whether it only acted as a conduit for reimbursing the developer for the construction costs of the water and sewer systems. The Commission concludes that Staff has not presented sufficient evidence to show that Lake Region or its predecessor imprudently assigned the availability fees to its shareholders in 1998 or used that revenue for utility purposes, thus making the fees a part of Lake Region's "franchise, works or system" at the time of the fee assignment.

¹⁵³ *Ozark Air Lines, Inc. v. Valley Oil Co., L.L.C.*, 239 S.W.3d 140, 145 (Mo. Ct. App. 2007); *Kansas City Power & Light Co. v. Bibb & Associates, Inc.*, 197 S.W.3d 147, 156 (Mo. Ct. App. 2006).

¹⁵⁴ *Joint Stipulation of Undisputed Facts*, No. 77.

¹⁵⁵ *Joint Stipulation of Undisputed Facts*, No. 44.

¹⁵⁶ *Joint Stipulation of Undisputed Facts*, No. 42.

While Public Counsel agrees with Staff that availability fees should be accounted for in setting rates, it does not believe that Staff's proposal of imputing revenue to Lake Region is reasonable because it would unjustly benefit shareholders by maintaining a higher rate base on which shareholder returns are calculated. Public Counsel recommends instead that the Commission apply availability fees against rate base as contributions in aid of construction ("CIAC"), which are donations or contributions of cash, service or property to a utility for purposes of construction. Public Counsel estimated that the availability fees collected far exceed the amount of the contributions already donated as CIAC by the developer for system construction and argues that these excess fees should also be treated as CIAC and further reduce Lake Region's rate base. However, the Commission finds Lake Region's evidence that it would take 45 years for the availability fees to fully reimburse the developer for the donated infrastructure to be more credible than Public Counsel's estimates. This indicates that the lot owners have not yet paid any excess fees that would justify reducing Lake Region's rate base.

In addition, the Commission determines it would be unjust and unreasonable for the Commission to adopt either Staff's or Public Counsel's recommendations. Either approach would deny the developer or its successors the opportunity to recover the original donated investment. This would also unfairly give the customers the double benefit of having part of the plant contributed, but then reducing rates through imputing fictitious revenue or further reducing rate base. It would be incorrect to assume that Lake Region can force the current beneficiaries of the availability fees (some of whom are not shareholders) to return those funds to the company in response to a Commission order. If Lake Region were to fail in that attempt, the company may suffer a revenue shortfall below its cost of service, which could have dramatic negative consequences to its financial viability. For all of the reasons stated above, the Commission concludes that availability fees collected from owners of undeveloped lots in Lake Region's service territory should not be classified as Lake Region revenue or applied against rate base.

B. Capital Structure

Findings of Fact

115. Lake Region is owned by RPS Properties, L.P. and Vernon Stump.¹⁵⁷ Vernon Stump acquired his shares in Lake Region from his wife, Sally Stump, on December 31, 2012.¹⁵⁸ RPS Properties, L.P. is a limited partnership for the Schwermann family with Robert Schwermann as the general partner.¹⁵⁹

116. In the 2010 rate case, all of the debt associated with Lake Region was debt of the then existing Lake Region shareholders with Alterra Bank as the lender ("shareholder loan"), and the parties to that rate case agreed that Lake Region should be considered to have a capital structure of 100% debt.¹⁶⁰

117. The shareholder loan was used in the acquisition of Lake Region and has been refinanced several times.¹⁶¹

¹⁵⁷ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 2; Transcript, Vol. VIII, p. 261.

¹⁵⁸ *Id.*; Transcript, Vol. VIII, p. 167.

¹⁵⁹ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 5.

¹⁶⁰ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 6-7; Staff Ex. 7, Atkinson Surrebuttal, p. 2-3.

¹⁶¹ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 5-6; Transcript, Vol. VIII, p. 165.

118. In 2011, Alterra Bank required a negative pledge agreement on the shareholder loan, in which the shareholders agreed not to pledge as collateral any of the assets of Lake Region on any other indebtedness.¹⁶² Other than the negative pledge agreement, the notes and pledge agreements for the shareholder loan do not mention Lake Region assets.¹⁶³ Alterra Bank later released the negative pledge agreement on the shareholder loan, and it was no longer in force as of January 1, 2014.¹⁶⁴

119. That shareholder loan is secured by the shareholders' shares of stock, but is not currently secured by any Lake Region utility assets.¹⁶⁵ The shares of stock are not considered to be assets of Lake Region for accounting purposes.¹⁶⁶

120. In 2012, Lake Region filed a financing application with the Commission in order to re-structure the company's finances to show approximately 60% debt and 40% equity.¹⁶⁷ With the approval of the Commission in File No. WF-2013-0118, Lake Region took out a loan from Alterra Bank in the amount of approximately \$1.4 million ("Lake Region loan"), which was used to repurchase common equity from Lake Region's shareholders and was secured by the company's utility assets and cash flow.¹⁶⁸

121. The current amount of the Lake Region loan is approximately \$1.4 million and the remaining amount of the shareholder loan is approximately \$1.3 million.¹⁶⁹

122. Lake Region's actual capital structure is 60% debt and 40% equity.¹⁷⁰

123. Staff used a Small Utility Return on Equity (ROE)/Rate of Return (ROR) Methodology ("methodology") to develop a hypothetical capital structure, target bond rating, and estimated return on equity.¹⁷¹ Staff's reasonable methodology is a transparent and verifiable method for establishing a capital structure and measurement of a fair return on equity.¹⁷²

124. Staff's methodology calls for the use of a hypothetical capital structure that limits debt to 75% of total capital in situations where a small water and sewer company has debt capital in excess of 75%.¹⁷³

125. Staff's methodology demonstrates that Lake Region's actual capital structure is consistent with the level of business and financial risk associated with a company such as Lake Region.¹⁷⁴

126. Regulatory recognition of Lake Region's actual capital structure makes it easier for Lake Region to obtain more favorable terms from lenders in the future when refinancing existing loans or securing additional capital.¹⁷⁵

¹⁶² Lake Region Ex. 7, Alterra Bank/RPS loan documents; Transcript, Vol. VIII, p. 170.

¹⁶³ Transcript, Vol. VIII, p. 187.

¹⁶⁴ Lake Region Ex. 2, Summers Rebuttal, p. 13-14; Lake Region Ex. 6; Transcript, Vol. VIII, p. 188.

¹⁶⁵ Lake Region Ex. 7, Alterra Bank/RPS loan documents; Lake Region Ex. 2, Summers Rebuttal, p. 12-13.

¹⁶⁶ Transcript, Vol. VIII, p. 176.

¹⁶⁷ Lake Region Ex. 2, Summers Rebuttal, p. 12.

¹⁶⁸ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 4-5; Transcript, Vol. VIII, p. 167-168.

¹⁶⁹ *Id.*

¹⁷⁰ Lake Region Ex. 2, Summers Rebuttal, p. 12.

¹⁷¹ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, Appendix 2, Schedule SA-1.

¹⁷² Lake Region Ex. 5, Gorman Rebuttal, p. 3.

¹⁷³ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, Appendix 2, Schedule SA-1, p. 4.

¹⁷⁴ Lake Region Ex. 5, Gorman Rebuttal, p. 2-11; Transcript, Vol. VIII, p. 150-51.

¹⁷⁵ Transcript, Vol. VIII, p. 158.

Conclusions of Law and Decision

The primary issue in determining Lake Region's appropriate capital structure is whether to apply the company's actual capital structure or a hypothetical capital structure. Both Lake Region and Public Counsel argue that the capital structure for Lake Region should be based on its actual capital structure, but Staff disagrees with that position.

Staff states that a hypothetical capital structure should be used for Lake Region, based on its conclusion that the company is financed with 100% debt. Staff reaches this conclusion because it includes in its calculation of company debt the shareholder loan. Staff considers the shareholder loan to be company debt because it believes that in the event of a default of the shareholder loan, the lending bank would take control of the utility's assets. In situations where a small water and sewer utility has debt in excess of 75% of capital, Staff believes it is appropriate to use a hypothetical capital structure that limits debt to 75% of total capital.

Staff's assumption that the shareholder loan is debt of the company is incorrect. The shareholders pledged their shares of stock in the company as security for the loan, but did not pledge the actual utility assets. In the event of a default, the lending bank would take control of the company stock, not the utility assets. Staff's position that the Lake Region loan and the shareholder loan should all be considered to be company debt requires that the corporate form of Lake Region be disregarded. A corporation such as Lake Region is a legal entity separate and distinct from its owners.¹⁷⁶ Courts look to the corporation, not the shareholders, in determining the corporation's rights and duties in respect to third parties unless the owners use the corporate form to engage in wrongful conduct.¹⁷⁷ One of the rare circumstances where the corporate form is disregarded is when a corporation is so dominated by a person as to be an alter ego of that person. In that case the two are treated as one, which is known as "piercing the corporate veil".¹⁷⁸ This theory is usually used when a third party is attempting to reach a shareholder's assets in litigation with a corporation. Staff's position is, in effect, a reverse pierce by using the shareholders' debts to affect the debt of the company. However, Staff has presented no evidence of fraud or wrongful conduct to justify disregarding Lake Region's corporate form and treating the shareholder loan as company debt. Therefore, the shareholder loan should not be considered in calculating Lake Region's amount of debt.

¹⁷⁶ *Forest City Mfg. Co. v. International Ladies' Garment Workers' Union, Local No. 104*, 111 S.W.2d 934, 940 (Mo. App. E.D. 1938).

¹⁷⁷ *Commerce Trust Co. v. Woodbury*, 77 F.2d 478, 487 (8th Cir. 1935).

¹⁷⁸ *Collet v. Am. Nat. Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986). In order to pierce the corporate veil, a party must show: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Since Lake Region's debt capital is less than 75%, according to Staff's reasonable methodology the use of a hypothetical capital structure is not appropriate. That methodology demonstrates that use of the actual capital structure of 60% debt and 40% equity is reasonable and benefits the company and its customers by lowering its cost of refinancing and obtaining additional capital in the future. The Commission concludes that the capital structure for Lake Region should be based on its actual capital structure of 60% debt and 40% equity.

C. Return on Equity

Findings of Fact

127. Staff used the same methodology for determining capital structure in order to estimate Lake Region's cost of common equity.¹⁷⁹ The methodology applies a standard risk premium to a reasonable estimate of the current cost of debt for Lake Region to arrive at an estimated return on equity.¹⁸⁰

128. At a 60% level of debt capital, Staff's methodology indicates that Lake Region's financial risk profile would be on the threshold between "Aggressive" and "Highly Leveraged". That financial risk profile, when applied to Standard & Poor's *Criteria Methodology: Business Risk/Financial Risk Matrix Expanded*, would support a credit rating that is approximately two notches higher than what Staff had used for its more leveraged capital structure recommendation.¹⁸¹

129. At a 60% level of debt capital, Staff's methodology supports Staff's alternative return on equity for Lake Region of 11.93%.¹⁸²

Conclusions of Law and Decision

In order to set a fair rate of return for Lake Region, the Commission must determine the weighted cost of each component of the utility's capital structure. The component at issue in this case is the estimated cost of common equity, or the return on equity. Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized.¹⁸³ Determining a rate of return on equity is imprecise and involves balancing a utility's need to compensate investors against its need to keep prices low for consumers.¹⁸⁴

¹⁷⁹ Staff Ex. 1, Report on Revenue Requirement-Cost of Service, p. 7.

¹⁸⁰ *Id.* at Appendix 2, Schedule SA-1, p. 2.

¹⁸¹ Staff Ex. 7, Atkinson Surrebuttal, p. 9; Staff Ex. 1, Report on Revenue Requirement-Cost of Service, Appendix 2, Schedule SA-3.

¹⁸² Staff Ex. 7, Atkinson Surrebuttal, p. 9.

¹⁸³ See Phillips, *The Regulation of Public Utilities*, Public Utilities Reports, Inc., p. 394 (1993).

¹⁸⁴ *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 274 S.W.3d 569, 574 (Mo. Ct. App. 2009).

Missouri court decisions recognize that the Commission has flexibility in fixing the rate of return, subject to existing economic conditions.¹⁸⁵ “The cases also recognize that the fixing of rates is a matter largely of prophecy and because of this commissions in carrying out their functions necessarily deal in what are called ‘zones of reasonableness’ the result of which is that they have some latitude in exercising this most difficult function.”¹⁸⁶ Moreover, the United States Supreme Court has instructed the judiciary not to interfere when the Commission's rate is within the zone of reasonableness.¹⁸⁷

In this case Staff and Lake Region agree that Staff's methodology for estimating a return on equity is reasonable, but differ on the result after applying the procedure. Staff believes that at a 60% level of debt capital the methodology supports a return on equity of 11.93%. Lake Region argues for the higher return of 13.89%, which Staff originally proposed for its hypothetical capital structure of 75% debt capital. Public Counsel recommends that Lake Region's return on equity should be set at 8.5%, which was the return awarded to Lake Region in the 2010 rate case.

The Commission determines that a fair and reasonable return on equity for Lake Region is 11.93%. Public Counsel's recommendation is not persuasive because it did not provide sufficient financial analysis to demonstrate that its recommended return is consistent with current market costs or would support Lake Region's financial integrity and access to capital markets. The Commission's determination that Lake Region's capital structure is 60% debt is a reduction from Staff's original proposal of 75% debt. This reduction in debt results in less financial risk for Lake Region's investors and supports a lower return on equity without compromising Lake Region's ability to attract investors and capital. The Commission concludes that a return on equity for Lake Region of 11.93% constitutes a reasonable balance between the interests of ratepayers and the utility's shareholders.

D. Legal Fees

Findings of Fact

130. In 2009, Shawnee Bend Development Company, LLC (“SB Development”) filed a civil action against Lake Region in the circuit court of Camden County, Missouri. SB Development alleged that Lake Region breached a 1998 contract and sought damages for alleged nonpayment of sums due for constructing a road crossing, a sewer trunk extension line and a well.¹⁸⁸

¹⁸⁵ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 570-571 (Mo. App. 1976).

¹⁸⁶ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 570 -571 (Mo. App. 1976). In fact, for a court to find that the present rate results in confiscation of the company's private property, that court would have to make a finding based on evidence that the present rate is outside of the zone of reasonableness, and that its effects would be such that the company would suffer financial disarray. *Id.*

¹⁸⁷ *State ex rel. Public Counsel v. Public Service Commission*, 274 S.W.3d 569, 574 (Mo. App. 2009). See, *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) (“courts are without authority to set aside any rate selected by the Commission [that] is within a ‘zone of reasonableness’”).

¹⁸⁸ Lake Region Ex. 2, Summers Rebuttal, p. 15.

131. The circuit court judge agreed with Lake Region's position, but SB Development appealed to the Southern District Court of Appeals.¹⁸⁹

132. On appeal, the Southern District Court of Appeals agreed with SB Development and reversed the trial court in favor of SB Development.¹⁹⁰

133. Lake Region participated in the appeal of the case to protect the trial court judgment in its favor in order to avoid increased costs should the judgment be reversed.¹⁹¹

134. Lake Region incurred non-recurring legal fees in defending the circuit court case and participating in the appeal.¹⁹² Lake Region incurred an additional \$520.10 in legal fees during the true-up period in pursuit of an application for transfer of the case to the Supreme Court.¹⁹³

Conclusions of Law and Decision

In rate cases, there is initially a presumption that a utility's expenditures incurred in providing utility service, which are one component of its revenue requirement, are prudent.¹⁹⁴ This presumption can be rebutted upon a showing of serious doubt as to the prudence of the expenditure, at which point the utility must dispel this doubt and prove the questioned expenditure is prudent.¹⁹⁵ The Commission has interpreted this process as follows:

In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility's management knew or should have known. In making this analysis, the Commission is mindful that "[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public."¹⁹⁶

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at p. 17; Transcript, Vol. VIII, p. 344.

¹⁹¹ *Id.* at p. 18.

¹⁹² *Id.*

¹⁹³ *Unanimous Partial Stipulation and Agreement as to True-Up Issues*, paragraph 3(b), filed March 17, 2014 and approved by Commission order issued March 26, 2014.

¹⁹⁴ *State ex rel. Public Counsel v. Public Service Comm'n*, 274 S.W.3d 569, 586 (Mo. App. 2009).

¹⁹⁵ *Id.*; *State ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520, 528 (Mo.App.1997); *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

¹⁹⁶ *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930); *In the Matter of Missouri-American Water Company's Tariff Sheets, Report and Order*, Case No. WR-2000-281 (August 31, 2000).

Lake Region incurred the legal expenses at issue defending a position that would have allowed the company to avoid increased costs. If Lake Region had ultimately been successful, it would have had to pay less money to SB Development regarding the 1998 contract dispute. The fact that Lake Region did not prevail on appeal does not make its decision to participate in the appeal imprudent, especially considering that Lake Region was successful at the circuit court level. Lake Region pursued a reasonable course of action by participating in the appeal of this case in an attempt to avoid increased costs. The Commission concludes that the legal fees incurred by Lake Region in defending the circuit court case and participating in the appeal, including the \$520.10 incurred during the true-up period, were reasonable and should be included in the calculation of rates for Lake Region.

Staff proposed that since these legal expenses are not a normal recurring cost, a five-year amortization with a tracker to prevent over-recovery is an appropriate mechanism to recover the expenses. The other parties agree that if these expenses are allowed, Staff's proposed amortization period and tracker should be applied. The Commission concludes that a five-year amortization with a tracker to prevent over-recovery is a reasonable mechanism to recover the expenses.

In making this decision as described above, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the material was not dispositive of this decision.

Additionally, Lake Region provides safe and adequate service, and the Commission concludes, based upon its independent review of the whole record, that the rates approved as a result of this order support the provision of safe and adequate service. The revenue increase approved by the Commission is concluded to be no more than what is sufficient to keep Lake Region's utility plants in proper repair for effective public service and provide to Lake Region's investors an opportunity to earn a reasonable return upon funds invested.

THE COMMISSION ORDERS THAT:

1. Lake Region Water & Sewer Company's objections to evidence presented by Staff and Public Counsel regarding availability fees as described in the body of this report and order are overruled.

2. The water and sewer service tariff sheets submitted on July 16, 2013, by Lake Region Water & Sewer Company, assigned Tariff Nos. YW-2014-0024 and YS-2014-0023, are rejected. The specific sheets rejected are:

P.S.C. MO. No. 1 (Water)

Second Revised Sheet No. 4, Replacing First Sheet No. 4
Second Revised Sheet No. 5, Replacing First Sheet No. 5
First Revised Sheet No. 7-A, Replacing Original Sheet No. 7-A

P.S.C. MO. No. 2 (Sewer)

Third Revised Sheet No. 6, Replacing Second Revised Sheet No. 6
Third Revised Sheet No. 7, Replacing Second Revised Sheet No. 7
Second Revised Sheet No. 8, Replacing First Revised Sheet No. 8

3. Lake Region Water & Sewer Company is authorized to file tariff sheets sufficient to recover revenues approved in compliance with this order. Lake Region Water & Sewer Company shall file its compliance tariff sheets no later than May 7, 2014.

4. Lake Region Water & Sewer Company shall file the information required by Section 393.275.1, RSMo 2000, and Commission Rule 4 CSR 240-10.060 no later than May 7, 2014.

5. The Staff of the Missouri Public Service Commission shall file its recommendation concerning approval of Lake Region Water & Sewer Company's compliance tariff sheets no later than May 19, 2014.

6. Any other party wishing to respond or comment regarding Lake Region Water & Sewer Company's compliance tariff sheets shall file the response or comment no later than May 19, 2014.

7. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.

8. This Report and Order shall become effective on May 30, 2014, except that Ordered Paragraphs 3, 4, 5 and 6 shall become effective upon issuance.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo.

Dated at Jefferson City, Missouri, on this 30th day of April, 2014

Missouri Landowners Alliance,)	
)	
Complainant,)	
)	
v.	)	<u>File No. EC-2014-0251</u>
)	
Grain Belt Express Clean Line LLC,))	
Grain Belt Express Holding LLC,)	
Clean Line Energy Partners LLC,)	
)	
Respondant.)	

EVIDENCE, PRACTICE AND PROCEDURE. §1. Generally. A Commission regulation bars certain communications with the Commission that do not include other persons. An applicant for a certificate of convenience and necessity published a website and other materials related to the applicant's business. Such publications do not constitute a communication with the Commission so the applicant did not violate the regulation.

ORDER GRANTING MOTION TO DISMISS

Issue Date: May 21, 2014

Effective Date: June 20, 2014

Syllabus: This order dismisses the above-styled complaint.

Procedural History

On March 11¹, Missouri Landowners Alliance ("MLA") filed the above-styled complaint. The complaint is that Respondents have violated and continue to violate Commission Rules 4 CSR 240-4.020(12) and (14) ("the rules").

The rules are part of the Commission's rules regarding ex parte and extra-record communications.² Among other things, MLA asks the Commission to order Respondents to revise their websites.

MLA does **not** allege that Respondents have had any prohibited communication with the Commission. However, MLA opines that the rules go beyond ex parte communication with the Commission. MLA states that Respondents violate the rules by maintaining websites and publishing materials in support of their goal of building transmission facilities across northern Missouri.

A summary of the rules is as follows: Subsection 12 states that it is improper for anyone to try to sway the Commission's judgment outside the hearing process. And subsection 14(F) states that an attorney shall not make a statement that a reasonable person would expect would be publicly disseminated outside the hearing process regarding the substance of a pending case.

Respondents answered on April 11, and filed a motion to dismiss on April 14. Complainant responded on April 15. The Staff of the Commission responded as ordered on April 28, stating that the Commission should dismiss the complaint.

¹ Calendar dates refer to 2014 unless otherwise noted.

² Commission Rules 4 CSR 240-4.020.

Decision

The Commission is an administrative body of limited jurisdiction, having only the powers expressly granted by statutes and reasonably incidental thereto.³ The Commission has no authority to declare or enforce any principle of law or equity.⁴ Likewise, the Commission also cannot grant equitable relief.⁵

Because the Commission's powers are limited to what the legislature confers upon the Commission, the Commission must review the enabling statute.⁶ That statute limits communications between the Commission and those outside the Commission regarding cases pending before the Commission.

The statute allows communications regarding a pending case if the communication is done at a public meeting, such as the Commission's regular Agenda meetings. It also lists steps parties must follow to notify other parties should they engage in communication with the Commission regarding the substance of a pending case when such communication is not made in a public forum.

Every subsection of § 386.210 RSMo pertains to communications **involving the Commission**. The statute does **not** limit communications **not involving the Commission**.

With this statutory limitation in mind, the Commission can and will interpret the rules.⁷ The primary purpose of rule construction is to ascertain the intent of the rule.⁸ The preamble of the rule states its purpose is:

To set forth the standards *to promote the public trust in the commission* with regard to pending filings and cases. This rule regulates *communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons regarding substantive issues that are not part of the evidentiary record* (emphasis supplied).

Upon analysis of the Commission's limited authority, the rules' enabling statute, and the preamble of the rules, the Commission concludes that the rules do not forbid the websites and publications about which MLA complains. Subsection (15) of the ex parte rule provides for potential remedies for failing to obey the Commission's ex parte rules.⁹

³ See, e.g., State ex. rel. City of St. Louis v. Missouri Public Service Comm'n, 73 S.W.2d 393, 399 (Mo. Banc 1934); State ex. rel. Kansas City Transit, Inc. v. Public Service Comm'n, 406 S.W.2d 5, 8 (Mo. 1966).

⁴ See, e.g., Straube v. Bowling Green Gas Co., 227 S.W.2d 666, 668-669 (Mo. 1950).

⁵ See, e.g., State ex. rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n, 116 S.W.3d 680, 695 (Mo. App. 2003); American Petroleum Exchange v. Public Service Comm'n, 172 S.W.2d 952, 955 (Mo. 1943).

⁶ Section 386.210 RSMo.

⁷ See, e.g., State ex. rel. Hoffman v. Public Service Comm'n, 530 S.W.2d 434, 439 (Mo.App. 1975), *rev'd on other grounds*, 550 S.W.2d 875 (Mo.App. 1977).

⁸ See State ex. rel. Competitive Telecommunications v. Public Service Comm'n, 886 S.W.2d 34, 39 (Mo.App. W.D. 1994).

⁹ Commission Rule 4 CSR 240-4.020(15)(allowing the Commission to issue an order to show cause for violations of subsections (3), (4), (5), (8), or (11) .

Tellingly, the Commission listed no remedy for a violation of subsection (12). Thus, subsection (12) of the rule is directory, not mandatory.¹⁰ Indeed, the word shall is found in virtually every subsection of Commission Rule 4 CSR 240-4.020 **except** subsection (12). In other words, not only does subsection (15) not give a remedy for a violation of subsection (12), subsection (12) does not even forbid any certain behavior; classifying an action as improper is not equal to prohibiting that action.

Subsection (14) of the rules specifically requires **attorney** misconduct. MLA, with no supporting legal authority, simply states that subsection (14) applies also to non-attorneys.¹¹ The remedies for violations of subsection (14) are specifically limited to attorneys.¹² Accordingly, subsection (14) applies only to attorneys.

Although the Commission's power is limited by statute, should the Commission have the power to do what MLA requests, the Commission would have grave concerns about restricting speech protected by The First Amendment of the United States Constitution and Article 1 of the Constitution of The State of Missouri.¹³ Respondents and Staff have briefed those constitutional issues admirably, and the Commission will not belabor the point with further discussion on it. And, finally, should it have the power to do what MLA requests, the Commission doubts the equity of ordering Respondent to edit its website when MLA itself apparently maintains its own website criticizing the proposed Grain Belt project across northern Missouri. Respondents allege MLA publishes such a website, and MLA, to date, has yet to deny the accusation.¹⁴

The Commission will dismiss the complaint.

THE COMMISSION ORDERS THAT:

1. The complaint is dismissed with prejudice.
2. The Data Center shall designate the complaint as public.
3. This order shall become effective on June 20, 2014.
4. This file shall be closed on June 21, 2014.

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Pridgin, Deputy Chief Regulatory Law Judge

¹⁰ See, e.g., *State v. Tisius*, 92 S.W.2d 751, 770 (Mo. banc 2002)(stating that where a statute or rule does not state what results will follow in the event of a failure to comply with its terms, the rule or statute is directory and not mandatory.)

¹¹ See Formal Complaint, p. 3 (filed March 11, 2014)(claiming that subsection 14(F) states that the attorney, and thus in effect the parties to the case, have certain obligations).

¹² See *id.* at fn. 9.

¹³ See, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 571-72 (in which the Court struck down the New York Public Service Commission's ban on utility advertising due to the ban violating The First and Fourteenth Amendments).

¹⁴ See, e.g., *McAlister v. Strohmeyer*, 395 S.W.2d 546, 554 (Mo.App. W.D. 2013)(stating that a litigant with unclean hands generally is not entitled to equitable relief such as an injunction.) See Respondent's Motion to Dismiss, p. 4 (filed April 14, 2014)(directing the reader to what appears to be MLA's website in opposition of Grain Belt's proposed project, found by pointing a web browser to <http://missourilandownersalliance.org/>).

In the Matter of Kansas City Power & Light	)	<u>File No. EO-2014-0095</u>
Company's Filing for Approval of Demand-Side	)	Tariff Nos. YE-2014-0286
Programs and for Authority to Establish A	)	YE-2014-0287
Demand-Side Programs Investment	)	YE-2014-0288
Mechanism)	

ELECTRIC. §42. Planning and management. The Commission approved a stipulation and agreement to change the provisions governing demand-side programs, which had resulted from an action nine years earlier, and approved the filing of tariffs as described in the stipulation and agreement.

ORDER APPROVING STIPULATION AND AGREEMENT

Issue Date: June 5, 2014

Effective Date: June 15, 2014

On January 7, 2014, Kansas City Power & Light Company (KCP&L) applied to the Commission for approval of Demand-Side Programs, and for authority to establish a Demand-Side Investment Mechanism (DSIM) as contemplated by the Missouri Energy Efficiency Investment Act (MEEIA) and the Commission's implementing regulations. The Commission provided notice of KCP&L's application and the following parties were allowed to intervene: Earth Island Institute d/b/a Renew Missouri; Union Electric Company d/b/a Ameren Missouri; Missouri Department of Economic Development – Division of Energy; The Empire District Electric Company; Sierra Club; Natural Resources Defense Council (NRDC); Brightergy, LLC; MC Power Companies, Inc.; Missouri Industrial Energy Consumers (MIEC); and Midwest Energy Consumers' Group (MECG). The Commission adopted a procedural schedule with the intent to conduct a hearing to take evidence about KCP&L's application.

On May 27, the Staff of the Commission, KCP&L, KCP&L Greater Missouri Operations Company (GMO), the Division of Energy, NRDC, Sierra Club, and Renew Missouri filed a non-unanimous stipulation and agreement to resolve all issues before the Commission. Empire, Ameren Missouri, MECG, MIEC, MC Power, Brightergy, and Public Counsel are also parties to this case and did not sign the stipulation and agreement. Public Counsel filed a statement on May 28 indicating it supports the stipulation and agreement. The other non-signatory parties have not acted to oppose the stipulation and agreement within seven days of its filing. Therefore, pursuant to Commission Rule 4 CSR 240-2.115(2), the Commission will treat the stipulation and agreement as unanimous.

The stipulation and agreement asks the Commission to approve twelve demand-side (MEEIA) programs for KCP&L's implementation. The stipulation and agreement also establishes a \$19,175,842 budget for the MEEIA programs and establishes annual energy and demand savings targets. In addition, the stipulation and agreement would allow KCP&L to recover the cost of the MEEIA programs by establishing a DSIM that would begin with the company's August 2014 billing. KCP&L's MEEIA plan would begin on July 6, 2014, or on the effective date of the implementing tariffs, and would run until December 31, 2015. After completion of the MEEIA plan, evaluation, measurement, and verification (EM&V) of the success of the plan will be conducted by an independent consultant.

As previously indicated, the stipulation and agreement provides that KCP&L's DSIM is to go into effect in August 2014. That provision is inconsistent with a stipulation and agreement that the Commission approved in 2005. That stipulation and agreement, which was approved in File No. EO-2005-0329, would prevent KCP&L from seeking to use any single-issue rate mechanism, which would include the proposed DSIM, until June 1, 2015.

Many of the signatories to the 2005 stipulation and agreement are also parties to this case and have either signed, or have not opposed, the stipulation and agreement. The stipulation and agreement represents that Staff and KCP&L have contacted the signatories to the 2005 stipulation and agreement that are not parties to this case and states that Praxair, the City of Kansas City, and the Missouri Joint Municipal Electric Utility Commission do not oppose allowing KCP&L to implement its DSIM before June 1, 2015. No party to the 2005 stipulation and agreement has voiced any opposition to early implementation of the DSIM.¹

The Commission approved the 2005 stipulation and agreement because it independently found there was competent and substantial evidence in the record to determine the agreement was in the public interest. The parties in this case are essentially asking the Commission to modify the 2005 agreement, and the Commission must determine whether doing so is in the public interest. Because the Commission has a duty to respond to changing circumstances to effectively regulate the utilities within its statutory charge, and based on the record in this case, the Commission specifically finds and concludes that allowing KCP&L to implement the proposed DSIM before June 1, 2015 is appropriate.

When KCP&L filed its application in January, 2014, it also filed implementing tariffs. Two of those tariffs currently carry an effective date of July 6, 2014, and the third was proposed to be effective on June 1, 2015. The stipulation and agreement does not explicitly state what is to be done with those tariffs. However, the stipulation and agreement sets forth sample tariffs that appear to be inconsistent with the previously filed tariffs. Therefore, the Commission will reject the tariffs that were issued on January 7, 2014, and KCP&L may file new tariffs consistent with the stipulation and agreement.

After reviewing the stipulation and agreement, the Commission independently finds and concludes that such stipulation and agreement is in the public interest and should be approved. Since this stipulation and agreement is not opposed by any party and because some of the provisions of the stipulation and agreement are time-sensitive, the Commission will make this order effective in ten days.

¹ The stipulation and agreement in this case, at page 13, states: "Staff and KCP&L have contacted all signatories to the Stipulation and Agreement ("CEP") in File No. EO-2005-0329 ("CEP Signatories"), explained the rider that Staff and KCP&L have agreed to as part of this settlement, and inquired of the CEP Signatories as to their position to allow for the DSIM Rider to begin before June 1, 2015. The following CEP Signatories, not parties to this case, have indicated they are not opposed to a DSIM Rider that begins before June 1, 2015; Praxair, City of Kansas City, Missouri, and Missouri Joint Municipal Electric Utility Commission."

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement filed on May 27, 2014, is approved as a resolution of the issues addressed in that stipulation and agreement. The signatory parties are ordered to comply with the terms of the stipulation and agreement. A copy of the stipulation and agreement is attached to this order, and is incorporated herein by reference.
2. The tariff sheets issued by Kansas City Power & Light Company under Tariff Nos. YE-2014-0286, YE-2014-0287, and YE-2014-0288 are rejected.
3. Kansas City Power & Light Company may issue new tariffs consistent with the approved stipulation and agreement.
4. The testimony of all witnesses whose testimony was pre-filed in this case is received into evidence.
5. This order shall become effective on June 15, 2014.

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Woodruff, Chief Regulatory Law Judge

NOTE: The Stipulation And Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of)	
Summit Natural Gas of Missouri Inc.'s	)	File No. GR-2014-0086
Filing of Revised Tariffs to Increase Its	)	Tracking No. YG-2014-0285
Annual Revenues for Natural Gas Service)	

EVIDENCE, PRACTICE AND PROCEDURE. §29. Discovery. The Commission may enforce discovery that is within "the practical reach" of the party served, like materials in the possession of a corporation's parent or related entities.

ORDER GRANTING MOTION TO COMPEL

Issue Date: June 19, 2014

Effective Date: June 19, 2014

Staff's motion to compel¹ ("motion") seeks information from Summit Natural Gas of Missouri, Inc. ("Summit"). The information is reasonably calculated to lead to the discovery of admissible evidence and is within Summit's practical ability to obtain.

Therefore, the Commission is granting the motion.

A. Background

In this action, the issue is the "propriety" of pending tariffs. Tariffs are Summit's proposed schedules of rates and terms governing natural gas service. The pending tariffs propose to increase the price of natural gas for Summit's customers. The propriety of those tariffs includes whether the increased rates are just and reasonable.²

To help the Commission³ determine the tariff's propriety, the parties have the right to discovery.⁴

Discovery before the Commission includes the devices available in circuit court for a civil action, plus data requests.⁵ A data request is an informal written discovery device by which parties, without counsel, exchange information and documents.⁶ Data requests are enforceable by the same means as civil discovery in circuit court.⁷ Those means include a motion to compel.⁸

Staff served Summit with data requests dated January 29,⁹ March 12, and May 2. Summit served Staff with objections dated February 5, March 21, and May 12. The Commission heard argument on the motion on June 13, 2014.

¹ Included in *Staff Statement Describing Discovery Concern and Motion for Reconsideration*, Electronic Filing and Information System No. 49, filed on June 10, 2014.

² Section 393.150.1, RSMo 2000.

³ *J.B.C. v. S.H.C.*, 719 S.W.2d 866 (Mo. App., E.D. 1986).

⁴ 4 CSR 240-2.090(2).

⁵ 4 CSR 240-2.090(2).

⁶ 4 CSR 240-2.090(2).

⁷ 4 CSR 240-2.090(1).

⁸ Mo. Rule 61.01(g).

⁹ All dates are in 2014.

B. Relevant or Reasonably Calculated

The data requests sought information about the finances of Summit and related entities. Summit argues that such information is beyond the scope of discovery. The scope of discovery includes more than admissible evidence.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party [.] It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. [¹⁰]

Staff has “the burden of establishing relevance.”¹¹

In support of the motion, Staff cites case law discussing a regulated utility’s financial status from the perspective of the utility’s owner.

[C]onsideration must be given to the actual equity owner in the ratemaking process. [Case law] specifically approves the Commission’s consideration of the return to the “investor” or “equity owner.” The use of a cost-of-capital approach as to the ultimate shareholder seems totally consistent with that language. The conscious and voluntary corporate business decision that resulted in the hierarchy as exists here should not and cannot shield pertinent financial data from the Commission’s scrutiny just because the ultimate owner does not provide the same service as the applicant and is not regulated. Also, once the utility asks for higher rates, a commission may inquire into the utility’s capital structure and apply a hypothetical construct. This capital structure was determined by the management of the companies, not by the rate order of the Commission. Despite the Company’s contention that it is operationally and financially independent from [its owners], it is hard to believe a wholly owned subsidiary could be as autonomous as is here claimed. [¹²]

That language supports the relevance of the information sought as to Summit and the related corporations.¹³

¹⁰ Mo. Rule 56.01(b)(1).

¹¹ Mo. Rule 56.01(b)(1), last sentence.

¹² *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm’n of Missouri*, 706 S.W.2d 870, 881 (Mo. App., W.D. 1985), (citations omitted).

¹³ That information includes financial reports, information on equity and debt, credit rating, capital structure, projected earnings per share growth rate, regulatory environment, cost of capital, capital structure, internal rate of return for investors direct and indirect, discounts, financial statements, and valuation of minority stock.

Therefore, the Commission concludes that the information sought is reasonably calculated to lead to the discovery of admissible evidence, and overrules Summit's objection.

C. Possession or Control

Summit's objections state in conclusory fashion that Summit does not have possession, custody, or control of the information because the information is in the hands of another person. But each such other person is either Summit's owner or another closely related entity. That fact refutes Summit's objections.

The Missouri Supreme Court has instructed that the essence of the "possession, custody or control" principle is practical ability to obtain.

Plaintiff misses the thrust of Rule 58.01(a). The rule is not limited to documents only in the possession of a party. Instead, Rule 58.01(a) provides that "[a]ny party may serve on another party a request (1) to produce ... any designated documents ... which are in the possession, custody *or control* of the party upon whom the request is served" (emphasis added). Our Rule 58.01(a) is identical to Federal Rule of Civil Procedure 34(a). The "[b]asic test of the rule is 'control' rather than custody or possession." ("The true test is control and not possession."). " 'Control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action." (A court may require a party to produce documents held by a non-party if the party has the "practical ability to obtain the documents ... irrespective of his legal entitlement to the documents."); ("The word 'control' is to be broadly construed...."). In [a criminal action], Missouri applied the "control" test in relation to discovery in a murder case holding that it was error for the trial court to allow into evidence a coat with bullet holes that had not been disclosed to the defense.

[¹⁴]

¹⁴ Hancock v. Shook, 100 S.W.3d 786, 796-97 (Mo. 2003), (citations and footnote omitted).

Missouri Supreme Court affirmed the exclusion from evidence of documents in the hands of a non-party that the plaintiff had the “practical ability to obtain.”¹⁵ In that case, the served party and possessing non-party were unrelated individuals: a dairy farmer and a veterinarian.

Much more persuasive are the facts of this case. Here the served party is a regulated utility and the possessing non-parties are owners of, or owned by, one another. The close relation of the corporate entities shows—and Summit has not denied—that Summit has the practical ability to obtain the information sought. And Staff seeks no exclusion of evidence, only compliance with discovery, as described under the case law cited.¹⁶

The enforceable reach of discovery is the practical reach of the party served, so the Commission will overrule the objection.

THE COMMISSION ORDERS THAT:

1. The motion to compel, set forth in the *Staff Statement Describing Discovery Concern and Motion for Reconsideration*, is granted.
2. Summit Natural Gas of Missouri, Inc. shall comply with the discovery requests described in the body of this order no later than June 20, 2014.
3. This order is effective immediately upon issuance.

R. Kenney, Chm., Stoll, W. Kenney
Hall, and Rupp, CC., concur.

Jordan, Senior Regulatory Law Judge

¹⁵ *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. 2003).

¹⁶ It is true that plaintiff did not object to the discovery, but waiver was not the basis of either ruling, circuit court or in the Missouri Supreme Court. *Hancock v. Shook*, 100 S.W.3d 786, 796-97 (Mo. 2003).

In the Matter of the Assessment Against)
 the Public Utilities in the State of Missouri) **Case No. AO-2014-0359**
 for the Expenses of the Commission for the)
 Fiscal Year Commencing July 1, 2014)

PUBLIC UTILITIES §7. Jurisdiction and powers of the State Commission. The Commission deducted the unexpended balance of the Public Service Commission Fund from its estimated expenses for the coming year and directs the assessment of the remaining amount against public utilities.

ASSESSMENT ORDER FOR FISCAL YEAR 2015

Issue Date: June 25, 2014

Effective Date: July 1, 2014

Pursuant to 386.370, RSMo 2000, the Commission estimates the expenses to be incurred by it during the fiscal year commencing July 1, 2014. These expenses are reasonably attributable to the regulation of public utilities as provided in Chapters 386, 392 and 393, RSMo and amount to \$20,796,307. Within that total, the Commission estimates the expenses directly attributable to the regulation of the six groups of public utilities: electrical, gas, heating, water, sewer and telephone, which total for all groups \$11,618,704. In addition to the separately identified costs for each utility group, the Commission estimates the amount of expenses that could not be attributed directly to any utility group of \$9,177,603.

The Commission estimates that the amount of Federal Gas Safety reimbursement will be \$550,000. The unexpended balance in the Public Service estimates its Fiscal Year 2015 Assessment to be \$18,057,497. The unexpended sum is allocated as a deduction from the estimated expenses of each utilities group listed above, in proportion to the group's gross intrastate operating revenue as a percentage of all groups' gross intrastate operating revenue for the calendar year of 2013, as provided by law. The reimbursement from the federal gas safety program is deducted from the estimated expenses attributed to the gas utility group.

The Commission allocates to each utility group its directly attributable estimated expenses. Additional common, administrative and other costs not directly attributable to any particular utility group are assessed according to the group's proportion of the total gross intrastate operating revenue of all utilities groups. Those amounts are set out with more specificity in documents located on the Commission's web page at <http://www.psc.mo.gov>.

The Commission fixes the amount so allocated to each such group of public utilities, net of said estimated unexpended fund balance and federal reimbursement as follows:

Electric	\$ 8,596,102
Gas	\$ 4,795,770
Steam/Heating	\$ 353,735
Water & Sewer.....	\$ 2,614,218
Telephone.....	\$ 1,697,672
Total	\$18,057,497

The Commission allocates a proportionate share of the \$18,057,497 to each industry group as indicated above. The amount allocated to each industry group is allotted to the companies within that group. This allotment is accomplished according to the percentage of each individual company's gross intrastate operating revenues compared to the total gross intrastate operating revenues for that group. The amount allotted to a company is the amount assessed to that company.

The Budget and Fiscal Services Department of the Commission is hereby directed to calculate the amount of such assessment against each public utility, and the Commission's Director of Administration and Regulatory Policy shall render a statement of such assessment to each public utility on or before July 1, 2014. The assessment shall be due and payable on or before July 15, 2014, or at the option of each public utility, it may be paid in equal quarterly installments on or before July 15, 2014, October 15, 2014, January 15, 2015, and April 15, 2015. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.

All checks shall be made payable to the Director of Revenue, State of Missouri; however, these checks must be sent to:

Missouri Public Service Commission
Budget and Fiscal Services Department
P.O. Box 360
Jefferson City, MO, 65102-0360

IT IS ORDERED THAT:

1. The assessment for fiscal year 2015 shall be as set forth herein.
2. The Budget and Fiscal Services Department of the Commission shall calculate the amount of such assessment against each public utility.
3. On behalf of the Commission, the Commission's Director of Administration and Regulatory Policy shall render a statement of such assessment to each public utility on or before July 1, 2014.
4. Each public utility shall pay its assessment as set forth herein.
5. The Budget and Fiscal Services Department shall deliver checks to the Director of Revenue the day they are received.
6. This order shall become effective on July 1, 2014.

R. Kenney, Chm., Stoll, Hall, and Rupp, CC., concur.
W. Kenney absent.

Woodruff, Chief Regulatory Law Judge

In the Matter of the Application of Union Electric)
 Company, d/b/a Ameren Missouri for Permission and)
 Approval and a Certificate of Public Convenience and)
 Necessity Authorizing it to Construct, Install, Own,) **File No. EA-2012-0281**
 Operate, Maintain, and Otherwise Control and)
 Manage a Utility Waste Landfill and Related Facilities)
 At its Labadie Energy Center.)

ELECTRIC. §3. Certificate of convenience and necessity. The Commission granted a certificate of convenience and necessity to build a coal ash landfill. The Commission conditioned the order on the applicant securing all necessary permits from the Missouri Department of Natural Resources but rejected other proposed conditions as superfluous and unauthorized.

REPORT AND ORDER

Issue Date: July 2, 2014

Effective Date: July 17, 2014

APPEARANCES

James B. Lowery and Michael R. Tripp, Attorneys at Law, Smith Lewis, LLP, 111 S. 9th Street, Ste. 200, Columbia, Missouri 65205.
 For Union Electric Company, d/b/a Ameren Missouri.

Nathan Williams, Deputy Staff Counsel, 200 Madison Street, Ste. 800, Jefferson City, Missouri 65102-0360.
 For the Staff of the Missouri Public Service Commission.

Lewis R. Mills, Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102-2230.
 For the Office of the Public Counsel and the Public.

Elizabeth J. Hubertz, Attorney at Law, **Maxine I. Lipeles**, Attorney at Law, **Giles Howard**, **Sydney Tonsfeldt**, and **Tamara Slater**, Rule 13 Certified Law Students, Interdisciplinary Environmental Law Clinic at Washington University School of Law, 1 Brookings Drive, Campus Box 1120, St. Louis, Missouri 63130.
 For Labadie Environmental Organization and Sierra Club.

CHIEF REGULATORY LAW JUDGE: **Morris L. Woodruff**

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This order grants Union Electric Company, d/b/a Ameren Missouri's application for a certificate of convenience and necessity to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill at that location.

Procedural History

On January 24, 2013, Ameren Missouri applied for a certificate of convenience and necessity seeking authority to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill and conduct other plant-related operations at the site. The Commission directed that notice of Ameren Missouri's filing be sent to potentially interested parties and directed that the public be notified of the filing. The Commission established February 22, 2013, as the deadline for the filing of applications to intervene.

Labadie Environmental Organization (LEO) and Sierra Club filed a joint application to intervene on February 22, 2013. The Commission granted that application to intervene on March 6, 2013, over the objection of Ameren Missouri.

In compliance with the established procedural schedule, the parties prefiled multiple rounds of testimony. In addition, the Commission held two local public hearings to collect testimony from interested members of the public. The first local public hearing was held in Union, Missouri, on June 25, 2013. Because of the large public response at the first local public hearing, the Commission held a second local public hearing in Washington, Missouri, on July 10, 2013. An evidentiary hearing was held on March 31, April 1, and April 2, 2014. The parties filed initial post-hearing briefs on April 30, 2014, with reply briefs filed on May 21, 2014.

Findings of Fact

The following facts (Numbers 1-17) are taken from the unanimous stipulation of facts filed by the parties on March 25, 2014.

1. Union Electric Company is a Missouri corporation registered with the Missouri Secretary of State and is in good standing to do business in Missouri as Ameren Missouri.
2. Ameren Missouri is a public utility, subject to the jurisdiction of the Missouri Public Service Commission, which provides electric service in portions of the state of Missouri.
3. About 1.2 million Missourians obtain their retail electric service from Ameren Missouri.
4. Ameren Missouri is seeking Commission permission and approval, and a certificate of convenience and necessity to expand the boundaries of its existing Labadie Energy Center, which will allow it to construct, install, own, operate, maintain, and otherwise control and manage a utility waste landfill and related facilities on approximately 813 acres of land adjoining its previously certificated Labadie Energy Center site in Franklin County, Missouri
5. Ameren Missouri owns the approximately 813 acres of land that is described by metes and bounds in Exhibit A attached to Ameren Missouri's application in this case.
6. Ameren paid about \$6.9 million to acquire the approximately 813 acres of land.
7. As a public electric utility, Ameren Missouri has a duty to provide safe and adequate electric service to those to whom it provides electric service.

8. Among the generating plants Ameren Missouri owns is the Labadie Energy Center, which can generate up to approximately 2.4 gigawatts (or 2,400 megawatts) of electricity.

9. Ameren Missouri's Labadie Energy Center is Ameren Missouri's largest generating plant.

10. To generate electricity at its Labadie Energy Center, Ameren Missouri converts energy in coal into electricity. To do that, Ameren Missouri burns the coal to generate heat, which is used to create steam that powers steam turbines that spin generators to produce electricity.

11. Coal combustion residuals, commonly known as coal ash, are byproducts of the combustion of coal at power plants.

12. Ameren Missouri uses its Labadie Energy Center to generate electricity, except when operational issues occur.

13. On average, Ameren Missouri's Labadie Energy Center generates approximately 460,000 cubic yards (550,000 tons) of coal combustion residuals per year.

14. The estimated cost of the initial construction of the utility waste landfill, including the first of four cells and monitoring wells, is \$27 million.

15. As designed, Ameren Missouri's estimated useful life of the four-cell utility waste landfill is approximately 24 years.

16. All costs associated with the utility waste landfill and related facilities adjoining its Labadie Energy Center that Ameren Missouri seeks to recover in rates will be subject to review by the Commission and parties in the rate case where Ameren Missouri seeks to begin recovery of them.

17. Ameren Missouri agrees with the Commission explicitly stating in any order granting to it a certificate of convenience and necessity for a utility waste landfill and related facilities adjoining its Labadie Energy Center that the grant of the certificate does not predetermine ratemaking treatment of the costs associated with the utility waste landfill and related facilities.

The Tartan Energy Standards

In evaluating applications for a certificate of convenience and necessity, the Commission usually examines five criteria known as the Tartan Energy Standards, named after the Commission case in which they were first listed.¹ Those criteria are: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. The Tartan case involved an application to provide natural gas service to the public so the criteria refer to services. But the Commission has applied the same criteria in evaluating applications for certificates to construct and operate facilities. The Commission will use those criteria to organize this report and order.

¹ *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, Report and Order, 3 Mo P.S.C. 3d 173, 177 (September 16, 1994). The *Tartan Energy* decision cites an earlier Commission decision, *In the Matter of the Application of Intercon Gas, Inc.*, Report and Order, 30 Mo. P.S.C. (N.S.) 554 (June 28, 1991). For that reason, the criteria are sometimes referred to as the Intercon Gas standards. The Commission's *Intercon Gas* decision was upheld by the Court of Appeals, but the court did not address the appropriateness of the standards. *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593 (Mo. App. W.D. 1993).

Is there a need for the proposed facility?

18. The Labadie Energy Center first began generating electricity in 1970. At that time, the coal combustion byproducts, referred to as coal ash, were stored in an impoundment, referred to as an ash pond, located near the generating facility. Additional ash ponds were constructed as older ponds filled to capacity.²

19. Coal ash comes in two types. Bottom ash is heavy material that collects at the bottom of the boiler, much as ash collects at the bottom of a fireplace. Fly ash is lighter material that is collected as it is going up the smokestack. Currently the coal ash that is produced by burning coal is collected, mixed with a large amount of water and sluiced into the ash ponds.³

20. Ameren Missouri's Labadie Energy Center currently produces approximately 460,000 cubic yards (550,000 tons) of coal ash per year. If, as anticipated, the company installs a wet flue gas desulphurization system – commonly called a “scrubber” - at the Labadie plant, the amount of coal ash produced each year will increase by 140,000 tons.⁴

21. Ameren Missouri determined that the existing coal ash ponds will soon be filled to capacity and that a new coal ash storage facility will be needed by approximately 2016.⁵ The proposed new coal ash landfill will have sufficient capacity to store the coal ash produced during the approximately 24 year remaining life of the Labadie Energy Center.⁶

22. All parties agree that if Ameren Missouri is to continue to produce electricity at its Labadie Energy Center, it must put the coal ash somewhere. Sierra Club and LEO's witness conceded that point at the hearing.⁷

23. While Sierra Club and LEO agree that the company “needs to do *something* with the large amount of coal waste its Labadie plant will generate over the next 24 years,”⁸ they disagree with Ameren Missouri's plan to build the coal ash landfill next to the Labadie Energy Center because the proposed landfill would be in a flood plain and in a seismic impact zone. In addition, they are concerned that the high groundwater table under the proposed coal ash landfill could lead to contamination of the groundwater.

24. The Labadie Energy Center and the proposed coal ash landfill are located in the valley of the Missouri river. The power plant and the existing ash ponds are built high enough to be outside the 100-year flood plain of the river.⁹ The proposed coal ash landfill is within the 100-year flood plain,¹⁰ and is within a seismic impact zone, meaning the area could be impacted by an earthquake.¹¹

² Giesmann Direct, Ex. 1, Page 2, Lines 15-20.

³ Transcript, Page 204, Lines 12-24.

⁴ Transcript, Page 102, Lines 7-15.

⁵ Giesmann Direct, Ex. 1, Page 3, Lines 1-4.

⁶ Transcript, Page 215, Lines 19-23.

⁷ Transcript, Page 517, Lines 13-19.

⁸ Intervenor's Post-Hearing Reply Brief, Page 5.

⁹ Transcript, Page 156, Lines 12-14.

¹⁰ Putrich Surrebuttal, Ex. 5, Pages 5-7.

¹¹ Putrich Surrebuttal, Ex. 5, Pages 8-9.

25. The proposed coal ash landfill has been designed to handle both potential problems. The landfill will be protected from flooding by a berm to an elevation of 488 feet, which is four feet higher than the 100-year flood plain and 0.4 feet above the 500-year flood plain.¹² The berm will be further protected by a fabric-formed concrete mat designed to protect the berm and thus the coal ash landfill against flood erosion.¹³ Finally, the coal ash disposed in the landfill sets into a form that is essentially a large block of concrete that would be impervious to flood erosion.¹⁴

26. The fact that the coal ash landfill will harden into what is essentially a large block of concrete also means that it is not susceptible to earthquake damage. Such an earthquake might at most crack the block of concrete.¹⁵

27. The coal ash landfill is designed to keep the coal ash away from contact with groundwater. The planned landfill includes a two-foot thick clay liner, which is then overlain by a HDPE (high-density polyethylene) geomembrane liner. The liner is designed to be two feet above the natural maximum groundwater level, except where there are leachate collection sumps, which are designed to be lower than the overall landfill, so that any water running off the waste will gravitate into the sumps.¹⁶ This design complies with Missouri Department of Natural Resources (MDNR) and proposed federal environmental regulations.¹⁷

28. Most significantly, MDNR has already determined that the proposed site is suitable for construction of a coal ash landfill. As required by MDNR's regulations, Ameren Missouri submitted a Preliminary Site Investigation to MDNR in December 2008.¹⁸ MDNR approved that Preliminary Site Investigation in February 2009.¹⁹ After obtaining approval of the Preliminary Site Investigation, Ameren Missouri submitted a Detailed Site Investigation to MDNR in May 2009.²⁰ MDNR completed its review of the Detailed Site Investigation and approved it in April 2011.²¹

29. Sierra Club and LEO assert that Ameren Missouri has not met its burden to prove that the coal ash landfill is needed at this site because it failed to adequately evaluate other potential sites that would be outside the flood plain and outside a seismic zone. Ameren Missouri evaluated other potential sites sufficiently to determine that the cost to transport the coal ash made them a more expensive alternative for disposal of the coal ash produced at its Labadie Energy Center. No party has pointed to anything in any statute, MDNR's regulations, or in the Commission's regulations that would require Ameren Missouri to conduct a more detailed evaluation of other potential disposal sites.

¹² Putrich Surrebuttal, Ex. 5, Page 7, Lines 10-17.

¹³ Putrich Surrebuttal, Ex. 5, Page 7, Lines 20-23.

¹⁴ Giesmann Surrebuttal, Ex. 2, Page 7, Lines 3-10.

¹⁵ Transcript, Page 236, Lines 10-19.

¹⁶ Putrich Surrebuttal, Ex. 5, Page 11, Lines 5-19.

¹⁷ Putrich Sur-Surrebuttal, Ex. 6, Page 2, Lines 3-7.

¹⁸ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 15-19, and Schedule CJG-S8.

¹⁹ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 19-20, and Schedule CJG-S9.

²⁰ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 20-22, and Schedule CJG-S10.

²¹ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 22-24, and Schedule CJG-S11.

30. In 2004, Ameren Missouri commissioned a Utility Waste Landfill Feasibility Study from Rietz and Jens, Inc., an engineering firm. That report, in describing general siting alternatives, advised that any landfill site would need to be approved by MDNR and local zoning authorities. It also warns that a utility waste landfill would likely be perceived as a public nuisance and would likely draw public opposition. The report concludes:

Often the best location to site a new public nuisance is next to an existing nuisance. In the case of a UWL (Utility Waste Landfill), the best siting location is probably adjacent to the power plant that is generating the waste (ash) that will be disposed of in the landfill. Siting the UWLs near the plants will also minimize the transportation costs which is typically the single most expensive aspect of ash disposal.²²

Ameren Missouri chose to take that advice and focused on siting the new coal ash landfill next to the existing Labadie plant.

31. Ameren Missouri's decision to focus its efforts on evaluating a site next to the Labadie Energy Center is also reasonable from an economic perspective. As the Reitz and Jens report indicated, it is expensive to transport ash off-site. The cost of disposing ash in an off-site landfill would be nearly \$100 million greater than disposal at an on-site landfill, costs that may eventually be passed to ratepayers.²³

32. Transporting the massive amount of coal ash generated at the Labadie Energy Center to an off-site landfill would also create non-economic hazards. Transporting the ash off-site would require that each day between 160 and 200 enclosed tanker trucks be driven on the roads through the Labadie community, exposing local residents to the hazards of such heavy truck traffic.²⁴

33. Because the existing coal ash ponds and the proposed coal ash landfill are located in the Missouri River Valley, they are in close contact with the river's alluvial aquifer. Sierra Club and LEO are concerned that contamination from the coal ash ponds or the coal ash landfill could contaminate the drinking water wells of residents near the site.

34. There is no system of groundwater monitoring wells surrounding the existing coal ash ponds at Labadie,²⁵ and current regulations do not require the presence of such a monitoring system.²⁶ MDNR regulations do require a system of groundwater monitoring wells to monitor the groundwater around the proposed coal ash landfill. The groundwater monitoring network that Ameren Missouri proposed as part of its construction permit application to MDNR meets or exceeds all MDNR regulatory requirements, and has enough wells to detect any contamination on-site before such contamination could move off-site.²⁷

²² Giesmann Surrebuttal, Ex. 2, Schedule CJG-S19, Pages 3 and 4.

²³ Giesmann Surrebuttal, Ex. 2, Pages 17 and 18.

²⁴ Giesmann Sur-Surrebuttal, Ex. 3, Page 16, Lines 4-8.

²⁵ Transcript, Page 594, Lines 4-14.

²⁶ Transcript, Page 628, Lines 10-16.

²⁷ Gass Surrebuttal, Ex. 10, Page 6, Lines 10-14.

35. Franklin County's Independent Registered Professional Engineer reviewed Ameren Missouri's groundwater monitoring plan and recommended placement of additional monitoring wells around the proposed coal ash landfill. Ameren Missouri responded by adding seven additional wells to the monitoring network,²⁸ and resubmitted the plan to MDNR for approval.²⁹ Franklin County and its engineer have now approved the revised groundwater monitoring plan.³⁰

36. The source of the groundwater immediately under the proposed coal ash landfill is the Missouri River's alluvial aquifer.³¹ The groundwater in the alluvial aquifer flows primarily horizontally along with the flow of the river, rather than down into a lower strata.³² There are no nearby drinking water wells that draw water from the alluvial aquifer. Indeed, MDNR would not permit a well that drew drinking water from the alluvial aquifer.³³

37. Drinking water wells in the area are located on the bluffs that overlook the river valley and draw their water from the underlying bedrock aquifer, known as the Ozark Aquifer. Groundwater from the Ozark Aquifer flows down from the bluffs, toward the river and up into the alluvial aquifer and into the river itself.³⁴

38. If any contaminants from the coal ash landfill were to enter the alluvial aquifer, they would be unlikely to migrate vertically down into the underlying Ozark Aquifer.³⁵ If contaminants did enter the Ozark Aquifer, they would be pushed toward the river and away from the drinking water wells on the bluffs.³⁶

Is Ameren Missouri qualified to operate the proposed facility?

39. Ameren Missouri is a long-established public utility that provides electricity to approximately 1.2 million Missourians. It has experience operating a vast network of electric generating and transmission facilities. It currently operates a similar dry coal ash landfill at its Sioux generating plant.³⁷

40. Before it can operate the proposed coal ash landfill, Ameren Missouri must obtain an operating permit from MDNR. MDNR has the technical expertise to determine whether Ameren Missouri qualifies for such a permit.

²⁸ Gass Supplemental, Ex. 12, Pages 3-4.

²⁹ Giesmann Supplemental, Ex. 4, Page 2, Lines 3-10.

³⁰ Giesmann Supplemental, Ex. 4, Page 4, Lines 7-11.

³¹ Transcript, Pages 182-183, Lines 24-25, 1

³² Gass Sur-Surrebuttal, Ex. 11, Page 4, Lines 1-18.

³³ Transcript, Page 183, Lines 11-15. *See also*, Gass Sur-Surrebuttal, Ex. 11, Pages 5-6, Lines 16- 21, 1-5.

³⁴ Transcript, Pages 612-613, Lines 24-25, 1-7.

³⁵ Transcript, Page 601, Lines 20-25.

³⁶ Ex. 1000.

³⁷ Transcript, Pages 206-207, Lines 23-25, 1-3.

41. Sierra Club and LEO challenge Ameren Missouri's qualification to operate the proposed coal ash landfill on three bases. First, they contend that Ameren Missouri has failed to ensure that its existing coal ash ponds at Labadie are not contaminating the environment. Second, they point to Ameren's handling of coal ash ponds at generating facilities in Illinois. Third, they contend that Ameren Missouri has almost no experience in operating a dry coal ash landfill of the type they propose to build at Labadie.

42. Sierra Club and LEO point to past seeps from the original unlined coal ash pond to show that Ameren Missouri is not qualified to operate the proposed coal ash landfill. Indeed, such seeps did exist as described in Ameren Missouri's December 20, 2011 Labadie NPDES (National Pollutant Discharge Elimination System) permit reapplication, which is the company's application for a water pollution discharge permit. However, that application also explains that Ameren Missouri has taken action to eliminate the seeps.³⁸ Specifically, Ameren Missouri eliminated the seeps in 2010 by installing a 600 foot long and 10 foot deep slurry wall.³⁹

43. Sierra Club and LEO also complain that Ameren Missouri has failed to voluntarily monitor groundwater in the area of the existing coal ash ponds to check for contamination.⁴⁰ In the future, MDNR may require Ameren Missouri to monitor groundwater around the existing coal ash ponds, but there is no such requirement at this time.⁴¹

44. Ameren Missouri's corporate parent, Ameren Corp., owns an affiliate, Ameren Energy Resources (AER), that operates in Illinois and is responsible for coal ash ponds at several coal-fired generating facilities in that state. In 2010, AER complied with the Illinois Environmental Protection Agency's (IEPA) request⁴² to install groundwater monitoring systems at coal ash ponds at its power generating facilities in Illinois. As a result of data revealed by that groundwater monitoring, the IEPA issued Violation Notices to AER for four of its facilities. To date, no enforcement actions have been taken by the IEPA.⁴³ Sierra Club and LEO argue that these actions in Illinois demonstrate that Ameren Missouri is not qualified to operate a coal ash landfill at Labadie.

45. In response to the actions taken by the IEPA, AER filed a petition with the Illinois Pollution Control Board asking the board to promulgate site-specific rules to establish enforceable deadlines, requirements and procedures to correct problems and close the sixteen ash ponds at AER's facilities in Illinois. The Illinois authorities are currently considering those rules.⁴⁴

46. Sierra Club and LEO also contend that because Ameren Missouri has little experience in operating a coal ash landfill, it has not shown that it is qualified to operate such a facility at Labadie. Ameren Missouri recently put the same type of coal ash landfill into operation at its Sioux electric generating plant.⁴⁵

³⁸ Exhibit 13.

³⁹ Transcript, Page 164, Lines 3-5.

⁴⁰ Transcript, Page 159, Lines 14-16.

⁴¹ Transcript, Pages 161-162, Lines 17-25, 1-13.

⁴² Transcript, Pages 390-393.

⁴³ King Surrebuttal, Ex. 9, Pages 6-7, Lines 6-16, 1-11.

⁴⁴ King Surrebuttal, Ex. 9, Pages 8-11.

⁴⁵ Transcript, Pages 206-207, Lines 23-25, 1-3.

Does Ameren Missouri have the financial ability to construct and operate the facility?

47. Ameren Missouri has already purchased the land needed to construct the facility and anticipates it will cost about \$27 million to build the first cell of the landfill.⁴⁶ Ameren Missouri had approximately \$3.5 billion in operating revenues in calendar year 2013. It had approximately \$803 million in operating income and \$395 million in net income during the same period. The company plans to fund construction of the landfill out of its existing treasury, which has approximately \$800 million available in a revolving credit arrangement.⁴⁷

Is the proposed facility economically feasible?

48. Because the cost of transporting coal ash increases with the distance that the ash must be transported for disposal,⁴⁸ there is really no question that, at least in the short- term, siting the coal ash landfill next to the generating plant is the cheapest option.⁴⁹ But Sierra Club and LEO assert that Ameren Missouri's economic evaluation of the relative cost of disposing of the coal ash at the on-site landfill or transporting it to some other site is incomplete because Ameren Missouri does not account for the possible cost to remediate environmental damage that may result from the existing coal ash ponds and the proposed landfill.⁵⁰ Sierra Club and LEO's witness testified that it is possible to quantify such potential costs, but, as a non-engineer, he did not attempt to do so.⁵¹

49. Most of Sierra Club and LEO's contamination concerns are centered on the existing coal ash ponds, one of which is unlined. Their witness conceded that a dry landfill of the sort Ameren Missouri wants to build is preferable to a coal ash pond and would likely defer contamination from the dry landfill for "generations", although he believes such contamination would eventually occur.⁵² He is concerned that because the proposed dry landfill is located close to the existing ash ponds, it might be difficult to determine whether contamination is coming from the ponds, or from the landfill. As a result, remediation costs might be higher than they would otherwise be.⁵³ The witness does not offer an opinion about how much those costs might be increased.

50. The existence or non-existence of environmental contamination emanating from the existing coal ash ponds at the Labadie Energy Center is not before the Commission in this proceeding. If Ameren Missouri faces remediation costs resulting from such contamination, it will face those costs regardless of whether the new coal ash landfill is built at Labadie, or at some other location. Any extra remediation costs that might result from locating the landfill near to the existing coal ash ponds are likely to be dwarfed by the extra costs resulting from locating the landfill at a distance from the Labadie Energy Center.

⁴⁶ Giesmann Direct, Ex. 1, Page 7, Lines 13-15.

⁴⁷ Transcript, Page 103, Lines 8-25.

⁴⁸ Transcript, Page 102, Lines 3-6.

⁴⁹ See, Giesmann Surrebuttal, Ex. 2, Pages 17-19.

⁵⁰ Norris Cross-Surrebuttal, Ex. 300, Page 6, Lines 11-20.

⁵¹ Transcript, Pages 579-581.

⁵² Transcript, Pages 577-579.

⁵³ Norris Cross-Surrebuttal, Ex. 300, Pages 7-8, Lines 9-23, 1-4.

51. Ameren Missouri is self-insured and has supplementary insurance against specific risks associated with its different types of plants, including those with a coal ash landfill.⁵⁴

Does construction and operation of the proposed facility promote the public interest?

52. MDNR has already determined that the proposed site is suitable for construction of a coal ash landfill. As required by MDNR's regulations, Ameren Missouri submitted a Preliminary Site Investigation to MDNR in December 2008.⁵⁵ MDNR approved that Preliminary Site Investigation in February 2009.⁵⁶ After obtaining approval of the Preliminary Site Investigation, Ameren Missouri submitted a Detailed Site Investigation to MDNR in May 2009.⁵⁷ MDNR completed its review of the Detailed Site Investigation and approved it in April 2011.⁵⁸

Conclusions of Law:

A. Ameren Missouri has applied for a certificate of convenience and necessity to expand the boundaries of the Labadie Energy Center to provide enough room to construct and operate a utility waste landfill. It makes that application pursuant to section 393.170, RSMo 2000.

B. Subsection 393.170.1, RSMo 2000 states "[n]o gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, *electric plant*, water system or sewer system without first having obtained the permission and approval of the commission." (emphasis added)

C. The utility waste landfill that Ameren Missouri proposes to build meets the definition of electric plant found in subsection 386.020(14), RSMo (Supp. 2013), in that it will be "real estate, fixtures and personal property operated, controlled, owned, used, or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power". Therefore, Ameren Missouri must obtain the permission and approval of the commission before expanding the boundary of the Labadie Energy Center to accommodate the construction of the landfill.

D. Subsection 393.170.3, RSMo 2000 gives the Commission power to grant authority to construct electric plant "whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service." That subsection also states "[t]he commission may by its order impose such condition or conditions as it may deem reasonable and necessary."

⁵⁴ Transcript, Page 198, Lines 15-24, Page 199, Lines 12-21.

⁵⁵ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 15-19, and Schedule CJG-S8.

⁵⁶ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 19-20, and Schedule CJG-S9.

⁵⁷ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 20-22, and Schedule CJG-S10.

⁵⁸ Giesmann Surrebuttal, Ex. 2, Page 5, Lines 22-24, and Schedule CJG-S11.

E. The phrase “necessary or convenient” does not require the new electric plant to be “essential” or “absolutely indispensable.” Rather it is sufficient if the new plant would be an improvement justifying its cost.⁵⁹

F. As the applicant, Ameren Missouri has the burden of proving the convenience or necessity of the certificate by a preponderance of the evidence.⁶⁰

G. Ameren Missouri is required to dispose of coal ash in compliance with the requirements of Chapter 260, RSMo 2000 and the implementing regulations promulgated by MDNR. In particular, section 260.205, RSMo (Supp. 2013) requires Ameren Missouri to obtain an operating permit from MDNR before it may operate a solid waste disposal area.

Decision:

Should the Commission grant Ameren Missouri the certificate it requests?

The Commission must grant Ameren Missouri’s application for a certificate of convenience and necessity if Ameren Missouri proves by a preponderance of the evidence that the authority it seeks is “necessary or convenient for the public service.” In determining whether Ameren Missouri has met its burden, the Commission will consider the previously described “Tartan Energy” standards.

First, is there a need for the proposed facility? The Labadie Energy Center will continue to burn coal and it will continue to produce massive amounts of coal ash. The need to dispose of that ash is undisputed, as is the eventual exhaustion of capacity in the existing ash ponds by approximately 2016. Storing the ash in a landfill located close to the power plant where it is produced will sharply reduce transportation costs and therefore is economically beneficial for Ameren Missouri and its ratepayers who would ultimately pay such transportation costs.

Despite the economic advantage of locating the landfill next to the power plant, storing coal ash in a landfill located in the Missouri River’s flood plain, in a seismic hazard zone, with a high groundwater table, creates problems that might be avoided if the landfill were developed at some other location. However, the landfill that Ameren Missouri proposes to build is designed to address the problems that go along with the location. The landfill is protected from flooding to the 500 year flood level by a reinforced berm. The coal ash will be stored in a dry form that is not subject to significant earthquake damage. Finally, the dry coal ash will be separated from contact with groundwater by a liner and an impermeable layer of clay. The Commission concludes there is a need to construct the coal ash landfill.

Second, is Ameren Missouri qualified to operate the proposed coal ash landfill? Ameren Missouri is a long-established electric utility with vast experience in operating an electric generation, transmission and distribution system. It currently operates a similar coal ash landfill at one of its other generating facilities. The criticisms that Sierra Club and LEO offer about Ameren Missouri’s ability to operate the proposed coal ash landfill are unfounded. The Commission concludes Ameren Missouri is qualified to operate the proposed coal ash landfill.

⁵⁹ *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm’n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993).

⁶⁰ *In the Matter of the Application of KCP&L Greater Missouri Operations Company*, Report and Order, 18 Mo. P.S.C. 3d 469, 494 (March 18, 2009)

Third, does Ameren Missouri have the financial ability to construct and operate the proposed coal ash landfill? Ameren Missouri has already purchased the land needed to construct the coal ash landfill, and it has the financial resources needed to construct and operate the landfill out of its existing treasury and income. The Commission concludes Ameren Missouri has the financial ability to construct and operate the proposed coal ash landfill.

Fourth, is the proposed facility economically feasible? Because the cost of transporting the coal ash to any other location is significant, storing the ash next to the generating facility is less expensive than transporting it to some other location. Sierra Club and LEO argue that the long-term costs resulting from the risk of storing the coal ash in the flood plain outweigh those short-term cost savings. However, their long-term cost concerns are aimed at remediation costs that might be associated with the existing coal ash ponds. If Ameren Missouri does incur any remediation costs resulting from contamination emanating from those existing coal ash ponds, it will incur those costs regardless of whether the new coal ash landfill is built on-site or at some other location. In contrast to the existing coal ash ponds, one of which is unlined, the coal ash landfill is designed to store the ash in a form, and in a manner, that will mitigate any concerns about contamination of the river and groundwater. The Commission concludes the proposed coal ash landfill is economically feasible.

Fifth and finally, does the construction and operation of the proposed coal ash landfill promote the public interest? It is clear that the coal ash generated by burning coal at the Labadie Energy Center must be stored somewhere. From the regulatory economic standpoint most often addressed by this Commission, the best location to construct the coal ash landfill is next to the generating facility, thereby avoiding the extra costs needed to transport the ash to some other location. However, Sierra Club and LEO's criticisms of the proposed location are ultimately founded on environmental rather than economic concerns.

Missouri state law does not give this Commission primary responsibility to address environmental concerns or to enforce environmental laws. Instead, the General Assembly has assigned that duty to MDNR. That department has reviewed the site Ameren Missouri has chosen for its proposed landfill and has approved that site for the construction of the landfill despite its location in a floodplain, in a seismic zone, with a high groundwater table.

The Commission has a responsibility to consider the public interest when deciding whether an application for a certificate of public convenience and necessity should be granted. The public interest includes concerns about the impact of the coal ash landfill on the environment and on public health. However, the Commission recognizes that MDNR has the technical expertise needed to fully evaluate the environmental and public health impacts of the coal ash landfill. For that reason, the Commission will respect MDNR's conclusion that the proposed landfill, as designed, may be built without significant danger to the environment or public health in the location Ameren Missouri has chosen.

After considering all the evidence offered in this case, including that the Labadie Energy Center is Ameren Missouri's largest generator of electricity, that the existing coal ash ponds will be at capacity by approximately 2016, that the coal ash must be deposited somewhere, that Ameren Missouri already owns the land on which it proposes to build a landfill, and that MDNR and local zoning authorities have approved the location and design of the proposed coal ash landfill, the Commission concludes that approving Ameren Missouri's application for a certificate of convenience and necessity to expand the boundaries of its Labadie Energy Center to allow room to construct and operate a coal ash landfill will promote the public interest.

Should the Commission impose any conditions on the granting of that certificate of convenience and necessity?

Having determined that Ameren Missouri's application for a certificate of convenience and necessity should be granted, the Commission must determine whether any conditions should be imposed on the granting of that certificate, as allowed by Subsection 393.170.3, RSMo 2000.

Sierra Club and LEO urge the Commission to impose five conditions on its approval of the certificate of convenience and necessity. The first condition they propose is:

Before commencing construction of the landfill, Ameren must conduct comprehensive groundwater monitoring at its existing coal ash ponds, with monitoring wells both upgradient and downgradient from the ponds, and with both shallow and deep wells pursuant to a monitoring plan approved by the Missouri Department of Natural Resources (DNR), and submit a report containing all monitoring data and analyses to the DNR and the Commission.

This proposed condition asks the Commission to compel MDNR's participation in a groundwater monitoring plan that MDNR has not required. The Commission does not have the statutory authority to require MDNR's engagement in this process. Therefore, the Commission cannot and will not impose the proposed condition.

The second condition proposed by Sierra Club and LEO is:

Ameren should not be able to charge, include in its rate, or in any other way recover from ratepayers and members of the public costs attributable to environmental damage caused by the landfill, including damage to the landfill, river and surrounding area associated with flood events, damage to the landfill, river and surrounding area associated with seismic action, and contamination of groundwater resources associated with the existing ponds and/or landfill.

The Commission recognizes that coal ash is a by-product of coal generation, and storage of the coal ash is part of that process. There are potential risks associated with any coal ash landfill. In fact, there are potential risks associated with transporting coal ash to another facility via truck, barge, or rail. It is inappropriate to make any determination regarding how to address those risks in future rates at this time. Simply put, this Commission cannot bind future Commissions. Even if the Commission were to impose such a condition in this order, a future Commission, looking at the issue many years from now, or even next week, would be free to decide for itself whether Ameren Missouri should be allowed to recover such costs. The Commission will not impose the proposed condition.

However, the Commission notes that throughout this case, Ameren Missouri has assured the Commission that the proposed coal ash landfill does not pose a threat to the environment and that environmental concerns are beyond the Commission's purview, despite the potential for financial impact on the utility in the event of an environmental disaster at the proposed landfill. Thus, the Commission suspects it would closely scrutinize any future request that remediation costs be included in rates.

The third condition proposed by Sierra Club and LEO is:

Ameren shall be responsible for all costs in excess of its current estimate of costs to construct and operate the proposed landfill and shall not be able to charge, include in its rate, or in any other way recover any excess costs from ratepayers and members of the public.

This proposed condition is inconsistent with Commission practice. Whether Ameren Missouri will be allowed to recover the cost of constructing the coal ash landfill, as well as any determination of the reasonableness of its cost to construct and operate the landfill, will be determined in a future rate case in which the Commission will consider all relevant factors. The Commission will not impose the proposed condition.

The fourth condition proposed by Sierra Club and LEO is:

Ameren must provide evidence of financial responsibility to remediate damage to, and contamination caused by, the landfill after the formal post-closure period addressed by DNR regulations.

The Commission believes this is a legitimate concern that directly implicates one of the Commission's key responsibilities: protecting Missouri ratepayers from excessive costs. While the Commission recognizes the potential risk of storing coal ash in a coal ash landfill or by transporting it via truck, barge, or rail, Ameren Missouri states that it is self-insured and carries supplemental insurance specifically designed to protect against the potential risks associated with coal ash landfills. Thus, imposition of this condition is not necessary.

The fifth and final condition proposed by Sierra Club and LEO is:

Ameren must comply with all applicable zoning, construction, operating, safety, and environmental requirements, and all other applicable laws and regulations, including filing with the Commission the following permits and licenses: (a) a Utility Waste Landfill construction permit issued by the DNR; (b) compliance with all Franklin County construction and zoning-related rules and regulations and the issuance of a zoning permit by Franklin County allowing for the construction of the landfill at the proposed location; (c) any required transportation and/or road permits; (d) and floodplain development permits; and (e) any land disturbance or stormwater permits.⁶¹

This proposed condition is unnecessary. Ameren Missouri will be required to comply with all applicable requirements, laws, and regulations whether or not the Commission makes that compliance a condition for granting the certificate of convenience and necessity. Furthermore, there is no need for the utility to file the otherwise required permits and licenses with the Commission. The Commission will not impose the proposed condition.

⁶¹ The five proposed conditions are quoted from Intervenor's Post-Hearing Reply Brief, Pages 18- 19.

Staff proposes to condition the Commission's approval of the certificate on Ameren Missouri having obtained the necessary permits from MDNR for the landfill construction and land disturbance. This condition is reasonable. Such permits are required before construction can start on the coal ash landfill and Staff has an interest in knowing when those permits are obtained. The Commission will include the condition recommended by Staff.

Staff also advises the Commission to add a statement that the granting of the certificate is not a determination of the ratemaking treatment of the costs associated with the landfill. Ameren Missouri accepts Staff's recommendations and the Commission routinely includes the statement recommended by Staff in orders granting certificates to remind all parties that ratemaking decisions will be made in appropriate ratemaking cases. That statement will be included in this order as well.

Commission orders are effective 30 days after issuance unless the Commission establishes some other effective date for the order. Any requests for rehearing must be filed before the effective date of the order, or no appeal is possible. Ameren Missouri has indicated it would like to begin construction of the landfill as soon as it obtains the necessary permission from the Commission and from MDNR. For that reason, the Commission will make this order effective in fifteen days. That may allow Ameren Missouri to begin construction expeditiously, while affording the other parties more than sufficient time to seek rehearing.

THE COMMISSION ORDERS THAT:

1. Union Electric Company, d/b/a Ameren Missouri is granted a certificate of public convenience and necessity to expand the boundaries of its existing Labadie Energy Center to allow it to construct and operate a utility waste landfill and related facilities and to conduct other plant-related operations at the site.
2. The granting of this application is conditioned upon Union Electric Company, d/b/a Ameren Missouri having obtained all necessary construction and land disturbance permits from the Missouri Department of Natural Resources. Union Electric Company, d/b/a Ameren Missouri shall notify the Commission when it has obtained the necessary construction and land disturbance permits from the Missouri Department of Natural Resources by filing copies of those permits in this file.
3. The granting of the certificate of convenience and necessity by this order is not a determination of the ratemaking treatment of the costs associated with the coal ash landfill.
4. This report and order shall become effective on July 17, 2014.

R. Kenney, Chm., concurs with separate concurring opinion attached,
Stoll, W. Kenney, and Rupp, CC., concur,
Hall, C., concurs with separate concurring opinion to follow.
and certify compliance with the
provision of Section 536.080, RSMo

Dated at Jefferson City, Missouri, on
this 2nd day of July, 2014.

NOTE: At the time of publication, no opinion of Commissioner Hall has been filed.

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric)
 Company, d/b/a Ameren Missouri for Permission)
 and Approval and a Certificate of Public)
 Convenience and Necessity Authorizing it to) Case No.: EA-2012-0281
 Construct, Install, Own, Operate, Maintain, and)
 Otherwise Control and Manage a Utility Waste)
 Landfill and Related Facilities At its Labadie)
 Energy Center)

CONCURRING OPINION OF CHAIRMAN ROBERT S. KENNEY

I concur in the Report and Order granting Ameren a certificate of convenience and necessity (CCN) because, applying the five *Tartan Energy*¹ elements, Ameren has met its burden of proving that the utility waste landfill (UWL) it proposes to build is "necessary or convenient for the public service."² I write separately, however, to address four points that are of particular note.

First, the Commission unequivocally has the authority to consider environmental and public health concerns in analyzing whether to issue a CCN, irrespective of the involvement of another state agency. Second, the Labadie Environmental Organization's concerns are not unfounded; they are, in fact, valid concerns that merit consideration. Third, I would have preferred to have seen proof of insurance covering the very specific risk of locating a UWL in a 100-year flood plain that is prone to seismic activity. Fourth, I want to emphasize that, while this Commission cannot bind a future Commission, future requests to recover remediation costs should be viewed with extraordinary care.

Introduction

The five standards announced in *Tartan Energy* were met in this case. Ameren will be burning coal to produce electricity. The byproducts must be stored somewhere. There is a need for the service. Ameren, by virtue of its experience and expertise as a provider of electric service, is qualified to provide the service. Ameren has shown that it has the financial ability to run the UWL and it is economically feasible. Finally, the necessary disposal of the inevitably produced coal combustion residuals is in the public interest. But the public interest analysis, in my estimation, does not end simply with an announcement that the utility has satisfied the other four standards.

¹ *In the Matter of the Application of Tartan Energy Co., L.C., d/b/a Southern Mo. Gas Co.*, 3 Mo. P.S.C. 3d 173, 177 (September 16, 1994), citing, *In the Matter of the Application of Intercon Gas, Inc.*, 30 Mo. P.S.C. 554 (June 28, 1991), *aff'd*, *State ex rel Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593 (Mo. Ct. App. 1993).

² Mo. Rev. Stat. § 393.170.3 (2010).

Discussion**I. The Commission May Appropriately Consider Public Health and Environmental Concerns in its Analysis**

The fifth factor requires an affirmative determination that the UWL is in the public interest. Part of the public interest analysis necessarily embraces an examination of the public health and environmental implications of locating the UWL in a 100-year flood plain and a seismic impact zone. The evidence supports the conclusion that the proposed UWL will be built in conformance with state and federal environmental standards. The evidence further demonstrates that the UWL will be built in such a way as to minimize its susceptibility to earthquake damage. And the evidence shows that the UWL will be constructed such that the potential for ground water contamination is mitigated. The Missouri Department of Natural Resources (DNR) has an extensive review process and has determined that the site is suitable for the UWL.

During the evidentiary hearing there were assertions that with DNR playing such a significant role in the permitting process, there was no role for this Commission to play in analyzing public health and environmental impacts. I disagree. As economic regulators, the Commission's analysis of the public health and environmental concerns will necessarily be different than that of the enforcers of environmental laws. Public health and environmental concerns have economic consequences. It is appropriate then, even obligatory, that this Commission, as economic regulators, undertake an appropriate consideration of the possible public health and environmental concerns, and the economic consequences flowing from those concerns, when rendering our decision as to whether locating a UWL in a 100-year flood plain and a seismic impact zone is in the public interest.³

II. The Labadie Environmental Organization's Concerns Are Valid and Merit Consideration

The Labadie Environmental Organization (LEO) was formed for the purpose of providing a vehicle for citizens living near the proposed UWL to advocate their concerns before public governmental bodies. Its concerns were advanced and heard during the local public hearings and the evidentiary hearing in this case. Contamination of one's potable drinking water supply is not to be taken lightly or dismissed summarily. Given recent coal ash spills in Kingston, Tennessee and Eden, North Carolina,⁴ given some of the testimony regarding the operations of Ameren's affiliate, Ameren Energy Resources, in Illinois, given the location of the UWL in a 100-year flood plain, and given its location in a seismic impact zone, LEO's concerns are readily understandable.

³ See also, Section 393.140 (2), which instructs that the Commission shall "have power to orders such reasonable improvements as will best promote the public interest [and] *preserve the public health . . .*" Mo. Rev. Stat. § 393.140 (2) (2010) (emphasis added).

⁴ Importantly, the coal ash ponds in Tennessee and North Carolina are qualitatively different from the proposed UWL here.

But even giving due consideration to LEO's concerns, Ameren's testimony demonstrates that the proposed UWL is designed to mitigate those concerns. The coal ash here will not remain wet; it will dry into what was described as a concrete-like substance, rendering it safe from erosion in the event of a flood. Additionally, this concrete-like substance is unlikely to be damaged during a seismic event. Further still, the UWL's design mitigates the possibility of groundwater contamination with an impermeable two-foot thick liner covered by an additional geomembrane liner. Finally, Ameren agreed to additional groundwater monitoring.

III. Proof of Insurance Should Be Provided

Even with all of the safeguards in place, accidents can happen. That is why I would have preferred to have seen proof of an insurance policy or rider that guards against the specific risks of locating a UWL in a 100-year flood plain and seismic impact zone. While there was testimony, and the Report and Order notes⁵, that Ameren is insured for certain risks, it was not clear that it is insured for the specific risks peculiar to this case.⁶

IV. Possible Future Remediation Costs Should Be Closely Scrutinized

In the event there is, in fact, insurance coverage for an event causally related to a UWL located in a 100-year flood plain or to seismic activity, ratepayers would, ostensibly, be protected against bearing the costs associated with any such event. But if there is no such insurance, or the costs are so great as to exceed the policy limits, ratepayers should not have to unreasonably bear the burden.

While it is true that this Commission cannot bind a future Commission, we can certainly provide guidance. As the Report and Order notes, Ameren has given assurances throughout the course of this case (in its application, in local public hearings, in the evidentiary hearing), that the UWL is safe, that concerns about groundwater contamination are unfounded. This Commission is issuing a CCN because the evidence supports Ameren's assurances and assertions. In the event, however, that potable water is contaminated because of a seismic event, a failure of the lining, or a flood, a future Commission would be well advised to look to this case for guidance.

⁵ See Report and Order, page 24.

⁶ See, e.g., Tr. Vol. 5, pages 198-99. When asked whether Ameren had insurance specifically covering the risk of seismic events, Ameren witness Craig J. Giesmann responded as follows: "You know, I'm not real certain on that, Commissioner. I know we are self-insured to a certain extent and then we do have supplementary insurance after that. And the specifics of that, for example, flooding and seismic, I don't know if there's riders." *Id.* at 198-99.

In response to further questioning about the existence of insurance covering the risk of seismic events and of being located in a 100-year flood plain, Mr. Geismann further testified as follows:

I would certainly expect so. And I guess what leads me to believe that is that I do know that our director of insurance has made site -- site visits with our insurers to the various ash ponds. So should we build this, I would expect the same thing to happen. So yes.

Id. at 199.

This testimony does not definitively establish the existence of the particular type of insurance that would cover the risk of locating a UWL in a 100-year flood plain or in a seismic impact zone.

The Commission writes Reports and Orders because that is the Commission's statutory charge. I write this concurrence for posterity. I hope a future Commission would read it and would be encouraged to closely scrutinize a request to recover in rates remediation costs attributable to a failure of this UWL caused by flood or earthquake.

Conclusion

While I support the issuance of a CCN, the environmental and public health concerns were significant enough to give me pause. Where drinking water is concerned, the stakes are high. And while Ameren has satisfied the five elements the Commission previously set out in *Tartan Energy*, it is important to affirm the appropriateness of taking into account environmental and public health concerns as a part of our public interest analysis, irrespective of another state agency's analysis. Further, LEO, comprising as it does citizens who would be profoundly affected by any failure of the UWL, raised valid concerns that merit consideration. Because of these valid concerns, I would have preferred to see proof of insurance covering the risks peculiar to this case. Finally, should there be future remediation costs because of a flood or seismic event, I trust a future Commission will look skeptically on any request to recover those costs in rates.

Respectfully Submitted,



Robert S. Kenney
Chairman

Dated at Jefferson City, Missouri
On this 2nd day of July 2014.

In the Matter of the Application of Union Electric)
 Company, d/b/a Ameren Missouri for Permission and)
 Approval and a Certificate of Public Convenience and)
 Necessity Authorizing it to Construct, Install, Own,)
 Operate, Maintain, and Otherwise Control and)
 Manage a Utility Waste Landfill and Related Facilities)
 At its Labadie Energy Center.)

File No. EA-2012-0281

CERTIFICATES. Electric. §26. Public safety. The Commission, having already considered the resources of the applicant, denies an application for rehearing that asks for proof of financial responsibility in the event of a leak from its expanded utility related landfill.

On an application for reconsideration, the Commission deleted a conclusion stating that the landfill liner met certain standards because the conclusion was disputed and unnecessary to the decision. The Commission, having already considered the resources of the applicant, denies an application for rehearing that asks for proof of financial responsibility in the event of a leak from its expanded utility related landfill.

§42. Electric and power. The Commission, having already considered the resources of the applicant, denies an application for rehearing that asks for proof of financial responsibility in the event of a leak from its expanded utility related landfill.

ORDER REGARDING APPLICATIONS FOR RECONSIDERATION

Issue Date: August 6, 2014

Effective Date: August 6, 2014

On July 2, 2014, the Commission issued a report and order that granted Union Electric Company d/b/a Ameren Missouri a certificate of convenience and necessity to expand the boundaries of its existing Labadie Energy Center to allow it to construct and operate a utility waste landfill and related facilities, and to conduct other plant-related operations at the site. That report and order became effective on July 17. On July 16, the Office of the Public Counsel filed a timely motion for reconsideration. Later that day, Labadie Environmental Organization (LEO) and Sierra Club gave notice that they join in that motion. Also on July 16, LEO and Sierra Club filed a separate motion for clarification, reconsideration, or rehearing.

Public Counsel's motion, in which LEO and Sierra Club join, does not question the Commission's decision to grant a certificate of convenience and necessity to Ameren Missouri. Instead, the motion asks the Commission to reconsider its decision to not impose a condition that would require Ameren Missouri to provide evidence of financial responsibility to remediate damage and contamination caused by the landfill. The Commission already considered the arguments presented in Public Counsel's motion. It has also considered Ameren Missouri's response that highlights its significant financial resources, which were evident in the record (Exhibit No. 107) and shows Ameren Missouri currently has \$13 billion in assets with only approximately \$4.2 billion in liabilities. The Commission finds no reason to reconsider its decision to deny the proposed condition and will deny Public Counsel's motion.

LEO and Sierra Club's motion for reconsideration, clarification, or rehearing also does not challenge the Commission's decision to grant a certificate of convenience and necessity to Ameren Missouri. Rather, LEO and Sierra Club ask the Commission to modify one sentence in one of its findings of fact. Specifically, paragraph 27 of the findings of fact describes the clay and geomembrane liners that are designed to keep the coal ash away from contact with groundwater. LEO and Sierra Club challenge only the last sentence of that paragraph, which states: "This design complies with Missouri Department of Natural Resources (MDNR) and proposed federal environmental regulations."

LEO and Sierra Club point out that MDNR has not yet in fact determined whether the landfill and its liner comply with its regulations. Furthermore, they deny that the liner design actually complies with the proposed federal regulations. Most importantly, they contend that the disputed sentence is unnecessary to the Commission's decision and should be deleted from the report and order.

Ameren Missouri responded to LEO and Sierra Club's motion on July 28. Ameren Missouri agrees that the sentence is not necessary to the Commission's decision. In its place, Ameren Missouri proposes a new sentence describing in more detail the liner's compliance with county and state regulatory requirements. LEO and Sierra Club responded on July 29, challenging the alternative language proposed by Ameren Missouri.

The Commission agrees with LEO and Sierra Club, and indeed with Ameren Missouri, that the challenged sentence is essentially a legal conclusion that is not necessary to support the Commission's decision. The Commission will delete that sentence from its report and order.

THE COMMISSION ORDERS THAT:

1. The Office of the Public Counsel's Limited Motion for Reconsideration is denied.
2. The motion for reconsideration filed by Labadie Environmental Organization and Sierra Club is granted to the extent that the final sentence of paragraph 27 in the findings of fact section of the report and order is deleted.
3. This order shall become effective upon issuance.

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Woodruff, Chief Regulatory Law Judge

In the Matter of the Application of)
 TELEXFREE, LLC for Registration to) **File No. DA-2014-0229**
 Provide Interconnected Voice Over)
 Internet Protocol Service)

TELECOMMUNICATIONS. §10. Abandonment or discontinuance. The Commission revoked the registration of an interconnected voice over internet protocol service provider on proof that the provider could no longer provide telecommunications services.

ORDER REVOKING IVolP REGISTRATION

Issue Date: July 2, 2014

Effective Date: August 1, 2014

On March 3, 2014, the Commission granted TELEXFREE, LLC, authority to provide Interconnected Voice over Internet Protocol (IVolP) services in Missouri. On May 22, the Commission's Staff filed a motion asking the Commission to revoke that authority.

Staff's motion, and the attached affidavit of John Van Eschen, explains that the United States Department of Justice has filed criminal charges against the owners of TELEXFREE, alleging that the company was operated as an illegal pyramid scheme. Staff indicates TELEXFREE has filed for bankruptcy and has suspended all business operations. The Commission directed TELEXFREE to respond to Staff's motion by June 24. TELEXFREE did not respond.

The Commission has only limited authority to regulate the operations of IVolP service providers that are registered under section 392.550, RSMo (Supp. 2012). However, paragraph 392.550.4(6) gives the Commission authority to revoke or suspend the registration of any provider of IVolP service that fails to comply with the requirements of that section. Based on its review of Staff's verified motion, the Commission finds that TELEXFREE has failed to comply with the requirements of section 392.550 and that its registration to provide IVolP should be revoked.

THE COMMISSION ORDERS THAT:

1. TELEXFREE, LLC's registration to provide Interconnected Voice over Internet Protocol service is revoked.
2. This order shall become effective on August 1, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
 and Rupp, CC., concur.

Woodruff, Chief Regulatory Law Judge

In the Matter of the Application of Lincoln)
 County Sewer and Water, LLC for Approval of) **File No. SR-2013-0321**
 a Rate Increase)

WATER. §18. Costs and expenses.

SEWER. §16. Costs and expenses. The Commission determined which hearing-related expenses to include in a public utility's rates, including attorney and consultant fees, company employee salaries and wages, mileage, lodging, and meals.

**ORDER REGARDING MOTION
TO ESTABLISH RATE CASE EXPENSE**

Issue Date: July 23, 2014

Effective Date: August 2, 2014

The Commission is allowing Lincoln County Sewer and Water, LLC (LCSW) to recover as rate case expense all attorney and consulting fees and limited miscellaneous expenses, with a 3-year amortization.

Background

On April 2, 2014, the Commission issued a Report and Order resolving issues presented by the parties with regard to LCSW's request for a rate increase. One such issue was whether the attorney fees of James Burlison should be included in rate case expense. Because the company retained the services of Brydon Swearngen & England as their attorneys, the Office of the Public Counsel argued that Mr. Burlison's participation was unnecessary. Consequently, Public Counsel sought to exclude his expenses from rate case expense.

Nevertheless, the Commission viewed Mr. Burlison's participation as reasonable and found that his expenses should be included in rates. The Report and Order was effective on May 2, 2014. On May 8, the company filed a motion to establish rate case expense. Those expenses are: (1) the attorney fees of Brydon, Swearngen & England; (2) the attorney fees of McIlroy and Millan (James Burlison); (3) the consulting fees of Dale W. Johansen d/b/a Johansen Consulting Services; and, (4) the expenses incurred by the company. The Commission held a hearing on June 13. Post-hearing briefs were filed on June 30.

Primarily, at issue are: the expenses claimed to have been incurred by the company, the time period over which all expenses should be recovered through rates, and the method of recovery – amortization or normalization.

The Amount of Rate Case Expense

Summary of the Parties' Positions

For rate case expense totaling \$66,510, the company requests \$31,210 in attorney fees, \$10,106 for consulting fees, and \$25,194 for time and expenses incurred by the company owners, Dennis Kallash and Toni Kallash. The company also requests that the expenses be amortized over three years with a tracker.

Staff agrees that the attorney and professional fees should be included in rates. Staff argues that all of the expenses of Dennis Kallash should be disallowed because they are unverifiable. Those of Toni Kallash, to the extent that they are verifiable, should be limited to \$4,700. Staff would also limit certain other expenses for copying, ink cartridges, mileage and labor for copying. Under Staff's analysis, the total rate case expense is \$47,115 and should be amortized over 5 years with a tracker.

Public Counsel argues that some professional fees are outside of an agreed-upon time frame to be considered for rate case expense. Additionally, Public Counsel would deny the company's request for expenses for copying, ink cartridges and labor for copying. Finally, Public Counsel would limit those expense for mileage, hotel and meal cost. Under Public Counsel's analysis, total rate case expense is \$39,662.16 and should be normalized over 3 years.

Findings

Professional Fees

The parties generally agree that attorney and consultant fees should be included in rate case expense. However, Public Counsel posits that the attorney and consultant fees should be limited to an already agreed-upon time frame ending on November 26, 2013; the date post-hearing briefs were filed.¹ The Report and Order was issued on April 2, 2014, with an effective date of May 2. Both the company and Public Counsel each filed an Application for Rehearing on May 1.

In an effort to recover rates case expense, the company filed its motion on May 8, with the parties filing alternate pleadings on May 13, 16 and 21, and June 5. This docket has gone well beyond the November date, culminating on June 13 with a hearing related solely to rate case expense and post-hearing briefs being filed on June 30, 2014. The company has raised this issue separate from the rate case hearing, thereby extending the typical rate case timeline and placing it in a unique posture before the Commission. However, given the history of this case, the Commission finds that it is reasonable to allow fees incurred after November 26, 2013.

Expenses for Company Time

The Commission is sensitive to the amount of time Dennis and Toni Kallash have spent preparing for this rate case, responding to requests from other parties, reviewing documents and attending hearings. Nevertheless, the Kallashes have been awarded a salary for the time they spend operating the sewer and water company; which will necessarily include regulatory activities. Even outside of the rate case, the company will be required to file annual reports, to respond to any complaints and generally take action to comply with statutes and rules of this Commission. The time spent complying with these requirements will be compensated at the hourly rates awarded in the Report and Order; \$39.65 to Mr. Kallash and \$15.34 to Ms. Kallash. It is the company's burden to show that the time dedicated by the company to rate case activities is recoverable through rate case expense. The company has not met this burden.

Staff and Public Counsel argue that the Commission should disallow recovery of the company's time spent on the case because of poor record-keeping. Whether the company's records are adequate is immaterial in light of the Commission's larger concern. A small number of ratepayers will be subject to significant yet reasonable costs with regard to automated meters, which was the central issue in the Report and Order. The Commission must balance the interest of a small number of ratepayers with the company's request for expenses to be included in rates paid by those ratepayers.

¹ Public Counsel post-hearing brief, page 4.

Staff and Public Counsel argue that the Commission should disallow recovery of the company's time spent on the case because of poor record-keeping. Whether the company's records are adequate is immaterial in light of the Commission's larger concern. A small number of ratepayers will be subject to significant yet reasonable costs with regard to automated meters, which was the central issue in the Report and Order. The Commission must balance the interest of a small number of ratepayers with the company's request for expenses to be included in rates paid by those ratepayers.

With the approved cost of automated meters that the customers will have to bear, it would be unjust to require them to shoulder the additional expense of compensation to the owners for their time spent during this rate case because they are compensated through the salary granted to the owners and the owners can control the issues raised in a rate case proceeding as well as the filing of a rate case.

Labor at Fitch & Associates

The company requests \$340 for work performed by "Patty", an employee of Fitch & Associates (an affiliate of Dennis Kallash).² The company arrived at this amount by valuing her hours worked at \$20/hour.³ Public Counsel would disallow this expense as being undocumented. The company has presented evidence of this expense⁴ and Staff asserts that the expense should be allowed but at the same rate allowed by the Commission for work performed by Toni Kallash; \$15.34. This results in \$260.78, or \$261. The Commission finds that Staff's approach is reasonable and will allow that \$261 be included in rate case expense.

Copying

The company seeks \$47.66 for ink cartridges purchased at Wal-Mart and has included a receipt for such.⁵ Public Counsel would exclude this expense. Staff does not object to this amount being included in rate expense. It is reasonable that the company would be required to purchase ink cartridges during a rate case because of the amount of copying the company has had to do to participate in this rate case. Both testimony and the receipt is evidence that \$47.66 was spent on ink cartridges, not \$327.79 as Mr. Kallash testified.⁶ The Commission finds it reasonable to include \$47.66 in rate case expense.

Hotels and Meals

The company seeks \$467 for hotel charges and meal costs.⁷ Although Staff does not object, Public Counsel points out that the hotel cost includes an overnight stay for Jim Burlison, the company's attorney, and Dennis Kallash.⁸ Mr. Burlison submitted an invoice to the company.⁹ As pointed out by Public Counsel, there is no obligation that the company bears the cost of Mr. Burlison's stay. The Commission finds that it is unreasonable to include Mr. Burlison's portion of hotel cost. However, Mr. Kallash incurred a cost of \$119.31.

² LCSW Exhibit 4, page 1; Transcript, page 476, lines 2-4.

³ LCSW Exhibit 4, page 1.

⁴ LCSW Exhibit 4, page 1; Transcript, page 452, lines 12-25.

⁵ LCSW Exhibit 4, last page.

⁶ Transcript, page 444, lines 8-9. Wal-Mart web search, item no. PG-210XL.

⁷ LCSW Exhibit 4, page 1.

⁸ LCSW Exhibit 4, DoubleTree Hotel receipts.

⁹ LCSW Exhibit 2.

The Commission will include the cost of Mr. Kallash's stay in rate case expense as it is reasonable.

The company submitted evidence showing meal costs reflected on a credit card statement in the amounts of \$162.35 on November 4, 2013, and \$26 and \$40 on November 5;¹⁰ all in Jefferson City. As pointed out by Public Counsel, Mr. Kallash was the only company personnel required to attend the hearing, which was held on November 5, 2013. Public Counsel reasons that there must be some meal cost incurred by Mr. Kallash and that the federal CONUS rates for Jefferson City should be applied, which would allow \$8.00 per breakfast, \$12.00 for lunch and \$26.00 for dinner. This amounts to \$46.00. The Commission finds Public Counsel's reliance, in this case, on federal CONUS rates to account for Mr. Kallash's meals is reasonable.

Mileage

As pointed out by Public Counsel, the company provided only a list of activities, then a total amount for mileage.¹¹ There are no dates for each activity or cost per activity. Further, some of the activities are unreasonable; e.g., measuring the office building, work at the office on weekends, and attending the local public hearing in Troy, Missouri where the company is located. It is reasonable, however, to include the cost of mileage of the company's trip to Jefferson City. Public Counsel suggests that the Internal Revenue Service rate of \$0.56 be used. The Commission finds that including a mileage cost of \$110.85 is reasonable.

Conclusions

Charges for rates must be just and reasonable and the burden of proving such is with the company.¹² While balancing the varied interests of the parties in the rate-making process, the Commission has broad discretion.¹³ In balancing the interest of the ratepayer and the company, the Commission concludes that it is just and reasonable for rates to reflect the expenses found above.

With regard to the time frame of recovery, the Commission's conclusion must be just and reasonable. The company proposes 3 years. Staff and Public Counsel propose 5 years. Because the Commission will limit expenses as found above, it is just and reasonable that the time frame should be the shorter of those proposed to bring recovery of those costs closer to the time at which they were incurred. Finally, to ensure that the exact amount of rate case expense is recovered, without regard to when the company may file another rate case request, the Commission will order that the expenses be amortized with a tracker.

¹⁰ LCSW Exhibit 4, Cabela's Club Visa account statements.

¹¹ LCSW Exhibit 4.

¹² Section 393.150, RSMo.

¹³ *State ex rel. Union Elec. Co. v Pub Serv. Comm'n of State of Mo.*, 765 S.W.2d 618,622 (Mo. App. W.D. 1988).

Decision

The above discussion results in the following:

\$27,990.00	from Brydon, Swearengen & England P.C. ¹⁴
\$3,220.00	from McIlroy & Millan ¹⁵
\$10,106.00	from Johansen Consulting, LLC ¹⁶
\$261.00	labor for an employee at Fitch & Associates
\$34.02	photocopies
\$47.66	ink cartridges from Wal-mart
\$119.31	Hotel costs
\$46.00	meal cost
<u>\$110.85</u>	mileage

\$41,934.84 TOTAL

The above expenses will be amortized over three years with a tracker.

THE COMMISSION ORDERS THAT:

1. Lincoln County Sewer and Water, LLC, shall include in rates expenses consistent with this order.
2. The parties shall file tariff sheets consistent with this order and the Report and Order issued on April 2, 2014.
3. This order shall become effective on August 2, 2014.

R. Kenney, Chm., Stoll, W. Kenney,
and Hall, CC., concur.
Rupp, C., dissents.

Jones, Senior Regulatory Law Judge

¹⁴ LCSW Exhibit 1.

¹⁵ LCSW Exhibit 2.

¹⁶ LCSW Exhibit 3.

In the Matter of the Application of Kansas City)
 Power & Light Company and KCP&L Greater)
 Missouri Operations Company for the Issuance)
 Of an Accounting Authority Order relating to their)
 Electrical Operations and for a Contingent Wavier)
 Of the Notice Requirement of 4 CSR 240-4.020(2))

File No. EU-2014-0077

ACCOUNTING. §42. Accounting Authority Orders. ELECTRIC. §43. Accounting Authority orders. A Commission regulation allows the issuance of an order under which an electric company may defer recording outside a recording year for extraordinary expenses. Extraordinary expenses do not include transmissions costs associated with membership in regional transmission organizations, so the Commission denied an electric company's application for an accounting authority order.

REPORT AND ORDER

Issue Date: July 30, 2014

Effective Date: August 29, 2014

APPEARANCES

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REGULATORY LAW JUDGE: **Kim S. Burton**

Procedural History

On September 20, 2013, Kansas City Power & Light Company (“KCP&L”) and KCP&L Greater Missouri Operations Company (“GMO”) (jointly referred to as “Companies”) filed an *Application for Accounting Authority Order*. Companies requested an Accounting Authority Order which would permit them to use a special accounting method to track transmissions costs associated with membership in the Southwest Power Pool and other transmission providers. The Commission granted applications to intervene filed by: The Empire District Electric Company, Missouri Industrial Energy Consumers Midwest Energy Consumers Group, and Union Electric Company d/b/a Ameren Missouri.

Companies carry the burden of proof. They must show by a preponderance of the evidence that they are entitled to the requested AAO.¹

Findings of Fact

1. KCP&L and GMO are corporations organized under the laws of the State of Missouri and the State of Delaware. Companies provide services in Missouri as electric utilities.

2. Companies are both members of the Southwest Power Pool (“SPP”), a Federal Energy Regulatory Commission approved regional transmission organization (“RTO”). SPP administers Open Access Transmission Service (“OATS”) over approximately 48,930 miles of transmission lines, covering portions of Arkansas, Kansas, Louisiana, Nebraska, New Mexico, Oklahoma, Texas, and Missouri.²

3. As members of SPP, Companies transferred functional control over their transmission facilities to SPP which provides transmission service pursuant to the OATS Tariff.³

¹ *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Commiss’n of Missouri*, 806 S.W.2d 432, 435 (Mo. App.W.D. 1991).

² Addo Rebuttal, pg. 9, ln. 1-4.

³ The transfer to SPP excludes certain grandfathered agreements. Direct Testimony of John Carlson, ln. 3-9.

4. Although SPP is a not-for-profit entity that remains revenue neutral, it must recover its costs from transmission customers, such as Companies.⁴ The SPP OATS Tariff authorizes SPP to collect from transmission service customers, like Companies, an administrative charge for the performance of its RTO functions.⁵ SPP's administrative charge is assessed to transmission customers on a money per MegaWatt Hour basis (\$/MWh) basis.⁶ SPP bills Companies a load ratio share (the ratio of a transmission customer's network load to the total SPP load) of regionally allocated costs, in addition to zonally allocated costs for SPP-approved projects.⁷

5. SPP is in the process of a multi-year build out of construction projects to expand the SPP transmission footprint.⁸ Due to a change in focus on regional reliability, and the construction of high voltage transmission projects planned to reduce system congestion and improve integration, SPP's administrative charges to its transmission customers are increasing.⁹

6. SPP's Base Plan Transmission Costs allocated to KCP&L were approximately \$10.5 million for calendar year 2012 and are projected to increase by approximately 16% per year through 2022.¹⁰

7. SPP's Base Plan Transmission Costs allocated to GMO were \$5.1 million for calendar year 2012 and are projected to increase by approximately 16% per year through 2022.¹¹

8. Companies filed an application for an Accounting Authority Order ("AAO") for transmission costs associated with SPP projects and other providers of transmission services, such as utilities, municipalities, and cooperatives from which Companies obtains transmission services.¹² The majority of transmission costs for which Companies seek deferral are projected to be charges from SPP.¹³

9. An AAO allows the "deferral" in the booking of a current expense to a utility's balance sheet as an asset.¹⁴ The cost is booked by a utility based upon the possibility that a regulatory authority will agree to allow recovery of the cost in a future rate case.¹⁵

⁴ Carlson Direct Testimony pg. 3, ln 3-15 and Addo Rebuttal HC, pg. 8, ln 28-29.

⁵ Oligschlaeger Rebuttal Testimony, p. 8, ln. 10-17.

⁶ Carlson Direct testimony pg. 11, ln. 15- pg. 12, ln. 1-19.

⁷ Carlson Direct Testimony, pg 6, ln 12-22).

⁸ Ives Direct Testimony, pg 3, ln 22-pg 4, ln 1.

⁹ Carlson Direct testimony pg. 12, ln. 19.

¹⁰ Carlson Direct Testimony, pg. 9, ln. 11-21.

¹¹ Carlson Direct Testimony, pg. 10, ln. 1-10.

¹² Oligschlaeger Rebuttal Testimony, p. 7, ln. 16-19.

¹³ Id.

¹⁴ Oligschlaeger Rebuttal Testimony, pg. 5, ln. 3-10

¹⁵ Tr. pg. 262 ln. 23 – pg. 263, ln. 8.

This allows costs to be recorded in a period other than that in which they were actually incurred.¹⁶ An AAO gives a utility the opportunity to obtain future rate recovery of extraordinary costs, even if those costs were not actually incurred within an ordered test year for a general rate proceeding.¹⁷

10. Companies' external auditors and public accounting firms require explicit authorization by the Commission for an AAO before recognizing deferrals in published financial reports.¹⁸ Companies cannot obtain many of the intended benefits of an AAO without the reporting of a deferral in published financial reports prepared by auditors and public accounting firms.¹⁹

11. Transmission expenses are part of the ordinary and normal costs of providing electric service by a utility and are ongoing.²⁰ Transmission costs fluctuate due to load variations, but are escalating on an annual basis.²¹ The expansion of SPP's regional projects and the potential funding required by SPP's members has been known for some time.²² The transmission cost environment faced by Companies is the norm for electric utilities within SPP and in other regions.²³ Companies' transmission expenses are not extraordinary.²⁴

12. The transmission expenses for which Companies seek an AAO are the type of expenses which may be collected through a Commission approved Fuel Adjustment Charge ("FAC") authorized during a general rate case proceeding.²⁵ GMO currently has an FAC; however, it does not include the transmission costs requested in the Application.²⁶

13. As part of a previous settlement agreement ("Settlement Agreement") KCP&L agreed that, prior to June 1, 2015, it would not seek to utilize any mechanism authorized in Senate Bill 179, such as an FAC, that might allow KCP&L to implement riders, surcharges or changes in rates outside of a general rate case based upon a consideration of less than all relevant factors.²⁷ The Settlement Agreement was approved by the Commission in a July 28, 2005 order.²⁸

¹⁶ Tr. pg. 179, ln. 10- pg. 180. Ln. 3.

¹⁷ Oligschlaeger Rebuttal Testimony, pg. 5, ln. 11-18.

¹⁸ Tr. pg. 257, ln. 5-13.

¹⁹ Tr. pg. 257, ln. 5-13.

²⁰ Oligschlaeger Rebuttal Testimony, p. 12, ln. 17 to pg. 13. Ln. 2.

²¹ Ives Direct Testimony, pg. 3, ln. 19-20.

²² Oligschlaeger Rebuttal Testimony, p. 12, ln. 8-18.

²³ Oligschlaeger Rebuttal Testimony, p. 12, ln. 10-16.

²⁴ Oligschlaeger Rebuttal Testimony, p. 10, ln. 14-19.

²⁵ Ives Direct Testimony, pg. 13, ln. 6-13.

²⁶ Tr. pg. 217, ln. 6-11. GMO's FAC, as set in ER-2012-0175, permits GMO to measure its fuel and purchased power expenses and pass fluctuations in those costs through to customers between general rate cases.

²⁷ Senate Bill 179 enacted § 386.266, which authorizes an electrical corporation, with Commission approval, to seek periodic rate adjustments outside of a general rate proceeding to reflect increases and decreases in prudently incurred purchased-power costs, including transportation.

²⁸ In Case No. EO-2005-0329, the Commission's order approving the Settlement Agreement went into effect on August 7, 2005.

Conclusions of Law

Companies are electrical corporations and public utilities, as those terms are defined in Section 383.020²⁹ and therefore subject to the Commission's jurisdiction. The Commission's statutory authority extends to prescribing the uniform methods by which Companies must keep accounts, records and books.³⁰ Through its rules, the Commission instructed electric utilities to comply with the Uniform System of Accounts ("USoA").³¹ The USoA, in its General Instruction No. 7, specifically states:

It is the intent that net income shall reflect all items of profit and loss during the period with the exception of prior period adjustments....Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future.

In Missouri, rates are normally established based off of a historic test year. The courts have stated that an AAO allows the deferral of a final decision on current *extraordinary* costs until a rate case and therefore is not retroactive ratemaking.³²

Consistent with the language in General Instruction No. 7, the Commission has evaluated the transmission costs for which Companies seek an AAO to determine if they are an unusual and infrequent occurrence. The Commission concludes they are not.

Companies began incurring transmission expenses when they began providing retail electric service. Transmission costs are part of the ordinary and normal costs of providing electric service and are expected to continue in the foreseeable future. Furthermore, while the transmission costs at issue may have a significant effect on Companies, they are not "abnormal and significantly different from the ordinary and typical activities" of the Companies. The increase in transmission costs was anticipated and is indeed the norm for all electric utility members of SPP. Therefore, the transmission costs are not extraordinary.

²⁹ All statutory references are to the 2000 Revised Statutes of Missouri, as cumulatively supplemented.

³⁰ § 393.140(4).

³¹ 4 CSR 240-20.030(1).

³² *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 301 S.W.3d 556 at 569-570 (Mo.App.2009)(internal citations omitted).

At hearing, Companies' witness Mr. Ives acknowledged that the transmission costs at issue are the type of expense that may be included in an FAC, similar to Ameren's FAC. Creating or adjusting an FAC to include transmission costs would require a general rate case under § 386.266.4. As part of a general rate case, KCP&L may seek an FAC to include transmission costs in June of 2015.

The Commission recognizes that its approval of an AAO is necessary in order for Companies to receive its intended benefits from the reporting of a deferral in published financial reports. Companies carry the burden of proof. They failed to show by a preponderance of the evidence that they are entitled to the requested AAO.³³ Based upon the competent and substantial evidence in the record, the Commission finds and concludes that KCP&L's and GMO's application for an AAO, or in the alternative a tracker, should be denied.

THE COMMISSION ORDERS THAT:

1. The Application for an Accounting Authority Order by KCP&L and GMO is denied.
2. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order are hereby denied.
3. This order shall become effective on August 29, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri
on this 30th day of July, 2014.

Kim S. Burton, Regulatory Law Judge,

³³ *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Commiss'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App.W.D. 1991).

In the Matter of the Amount Assessed on Companies)
to Fund the Missouri Universal Service Fund)

File No. TO-2014-0333

TELECOMMUNICATIONS. §14.1 Universal Service Fund. The Commission reduced the assessment on telecommunications companies, and increased the support rate, for the Missouri Universal Service Fund ("USF").

ORDER DECREASING ASSESSMENT RATE AND INCREASING MONTHLY SUPPORT RATE

Issue Date: July 30, 2014

Effective Date: August 29, 2014

On May 6, 2014, the Staff of the Commission ("Staff"), acting at the request of the Missouri Universal Service Board, filed a motion asking the Commission to consider altering the Missouri Universal Service Fund ("USF") assessment rate.¹ Staff recommends the Commission reduce the USF assessment rate from .0017 to .0010. Staff further asks the Commission to increase Missouri USF monthly support to companies from \$3.50 to \$6.50 to keep pace with basic local service rate increases.

The Commission directed that notice of Staff's motion be sent to all telecommunications carriers and IVoIP providers doing business in Missouri. The Commission also ordered that any comments should be filed no later than June 13. The Commission received comments from TW Telecom of Kansas City and Socket Telecom ("TW Telecom"), the Office of the Public Counsel ("OPC"), and the Missouri Small Telephone Company Group ("STCG").

TW Telecom supports reducing the assessment rate to .0003 or less. It says the reduction would help reduce the burden imposed on the consumer who receives the pass-through effect of the fee.

STCG supports increasing the monthly support amount. STCG comments that rates for basic local service have increased due to federal USF reforms, and that the support amount should be increased from \$3.50 to \$6.50 monthly to help ease the impact of local service rate increases.

OPC supports reducing the assessment to .0010, and increasing the support amount to \$6.50. OPC further requests more outreach may be needed to ensure all those who are eligible for Lifeline or Disabled programs apply for such programs.

On July 8, Staff filed its Recommendation. After reviewing the comments, Staff continues to recommend that the Commission reduce the assessment rate to .0010, and increase the monthly USF support amount to \$6.50.

Staff states that the new Missouri assessment level should become effective on October 1 to help accommodate the USF Administrator's system design to correctly calculate remittances due. Also, Staff asks the Commission to waive the support amounts identified in Commission Rules 4 CSR 240-31.120(1)(B)(2) and 4 CSR 240-31.120(1)(C)(1).

Commission Rule 4 CSR 240-2.080(15) allows parties ten days to respond to pleadings unless otherwise ordered. The Commission issued no order to the contrary, ten days have elapsed since Staff's Recommendation, and no party has responded to the Recommendation.

¹ Calendar references are to 2014 unless otherwise noted.

Section 392.248.1, RSMo 2000 creates the Missouri Universal Service Board and charges it with the duty to “ensure just, reasonable, and affordable rates for reasonably comparable essential local telecommunications services throughout the State.” That statute also creates a state Universal Service Fund that is funded through an assessment on all telecommunications companies in the state. The Commission is required to establish the level of funding needed to accomplish the purposes of the Universal Service Fund.²

The Commission finds that the Universal Service Board’s recommendation is reasonable. Furthermore, no person or entity has expressed any opposition to that recommendation. The Commission will reduce the assessment rate as recommended by the Universal Service Board.

THE COMMISSION ORDERS THAT:

1. The assessment rate for the Missouri Universal Service Fund is reduced from .0017 to .0010, effective October 1, 2014.
2. The monthly Missouri USF support rate is increased from \$3.50 to \$6.50, effective October 1, 2014.
3. The Commission’s Data Center shall send a copy of this order to all interexchange carriers, competitive local exchange carriers, incumbent local exchange carriers and IVoIP providers doing business in Missouri.
4. This order shall become effective on August 29, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur.

Pridgin, Deputy Chief Regulatory Law Judge

NOTE: An Order Of Nunc Pro Tunc has been filed and is available in the official case files of the Public Service Commission.

² Section 392.248.3, RSMo 2000.

Noranda Aluminum, Inc., et al.,)	
)	
Complainants,)	
)	
v.	)	<u>File No. EC-2014-0224</u>
)	
Union Electric Company, d/b/a)	
Ameren Missouri)	
)	
Respondent.)	

ELECTRIC. §19. Discrimination. §20. Rates.

RATES. §8. Reasonableness generally. §10. Ability to pay. §21. Discrimination, partiality, or unfairness. §22. Economic conditions. §28. Large consumption. §62. Initiation of rates and rate changes. §104. Electric and power. §119. Rate design, class cost of service for electric utilities. Customers of a public utility filed a complaint charging that the public utility's rate design was not just and reasonable because the customer could no longer afford it. The Commission found that the rate had not become unjust and unreasonable because, though a customer's continued operation was valuable to the economy of Missouri, the relief was not determinative of the customer's continued operations and would not benefit the public utility's other ratepayers.

REPORT AND ORDER

Issue Date: August 20, 2014

Effective Date: September 19, 2014

APPEARANCES

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And

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And

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For Union Electric Company, d/b/a Ameren Missouri.

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For the Staff of the Missouri Public Service Commission.

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For the Office of the Public Counsel and the Public.

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And

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For the City of O'Fallon and the City of Ballwin.

CHIEF REGULATORY LAW JUDGE: **Morris L. Woodruff**

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

In this case, Complainants seek a change in rate design to reduce the rate assessed to the Large Transmission Service Class, of which Noranda Aluminum, Inc. is the only customer and which is the lowest-cost rate class of all customer classes served by Ameren Missouri. This proposal asks the Commission to provide rate relief that departs from traditional cost-of-service ratemaking. Complainants' request is founded on three contentions: 1) Noranda Aluminum, Inc.'s aluminum smelter is crucial to Missouri's economy; 2) the smelter cannot be sustained without the rate relief requested; and 3) all Ameren Missouri ratepayers will directly benefit from the relief requested because granting that relief is more beneficial compared to Noranda leaving the Ameren Missouri system.¹ While there is substantial evidence in the record regarding the impact of the smelter on southeast Missouri and on the state, the evidence does not support the second and third of Complainants' contentions. Accordingly, the Commission finds that the Complainants have failed to carry their burden to show that Ameren Missouri's rate design should be modified, contrary to traditional cost of service principles, in order to give a reduced rate to Noranda Aluminum, Inc. The complaint is, therefore, denied and dismissed.

Procedural History

On February 12, 2014,² Noranda Aluminum, Inc., joined by 37 individual customers of Union Electric Company, d/b/a Ameren Missouri, filed a rate design complaint and request for expedited review. The complaint asked the Commission to revise the rate Ameren Missouri is allowed to charge Noranda for operation of its aluminum smelter located near New Madrid, Missouri. The Complainants seek to reduce the rate charged to Noranda to \$30 per MWh and to adjust the electric rates of Ameren Missouri's other ratepayers upward to make the rate changes revenue neutral to Ameren Missouri. The complaint alleges that unless Noranda receives the reduced rate it seeks, it will lack sufficient liquidity and may be forced to close.

As required by Commission rule 4 CSR 240-2.070, the Commission notified Ameren Missouri of the filing of the complaint and directed the utility to file its answer no later than March 17. Ameren Missouri filed its answer on March 17, along with a motion to dismiss the complaint. The Commission denied that motion to dismiss on April 16.

¹ Initial Post-Hearing Brief of Noranda Aluminum, Inc., page 2.

² Date references are to 2014 unless otherwise indicated.

The Commission allowed the following parties to intervene: Consumers Council of Missouri; Continental Cement Company; the City of O'Fallon and the City of Ballwin; Wal-Mart Stores East, L.P. and Sam's East; the Missouri Industrial Energy Consumers; River Cement Company; and the Missouri Retailers Association. In compliance with an expedited procedural schedule, the parties prefiled multiple rounds of testimony. In addition, the Commission held three local public hearings to collect testimony from interested members of the public. An evidentiary hearing was held on June 16 and 17. The parties filed initial post-hearing briefs on July 8, with reply briefs filed on July 16.³

Findings of Fact

1. Union Electric Company is an investor-owned electric utility, subject to the jurisdiction of this Commission and is the largest electric utility in Missouri.⁴

2. Noranda Aluminum, Inc., is a publicly-traded (NYSE) company that operates as an integrated aluminum manufacturer. It owns and operates an aluminum smelter near New Madrid, Missouri, and also owns and operates a bauxite mine in Jamaica, an alumina refinery in Louisiana, and rolling mills in Arkansas, North Carolina, and Tennessee.⁵

3. Noranda's New Madrid smelter processes alumina into molten aluminum, which is then processed into aluminum products such as billet, rod, foundry products, and primary ingots. The process of converting alumina into molten aluminum requires prodigious amounts of electricity.⁶

4. The New Madrid smelter uses approximately 480 MW of electricity, 24 hours per day, every day of the year. It does so with a 98 percent load factor, meaning the amount of electricity it uses varies very little from hour to hour. Noranda is Ameren Missouri's largest customer, and is the largest consumer of electricity in Missouri.⁷

5. When the New Madrid smelter is at full production, at current rates, Noranda pays Ameren Missouri approximately \$160 million in base rates for electricity each year, plus additional charges under Ameren Missouri's fuel adjustment clause.⁸

6. Noranda employs 888 workers at its New Madrid smelter and is the largest manufacturing employer in the southeast area of Missouri.⁹ The smelter's estimated payroll in 2013 was \$95 million, and its presence has a large economic impact on that economically depressed region, and upon the entire state.¹⁰ The closure of the smelter could reduce the gross domestic product of the state of Missouri by nearly \$9 billion over a 25 year period.¹¹

³ United for Missouri filed an *amicus curiae* brief on July 8.

⁴ Rate Design Complaint, Paragraph 3, admitted in Ameren Missouri's Answer.

⁵ Smith Direct, Ex. 2, Pages 1-2, Lines 10-15, 1-2.

⁶ Smith Direct, Ex. 2, Page 2, Lines 2-19.

⁷ Smith Direct, Ex. 2, Page 9, Lines 17-22.

⁸ Smith Direct, Ex. 2, Page 10, Lines 7-10.

⁹ Haslag Direct, Ex. 11, Page 5, Lines 13-14.

¹⁰ Haslag Direct, Ex. 11, Page 18, Lines 6-8.

¹¹ Haslag Direct, Ex. 11, Page 18, Lines 6-8.

7. The price Noranda receives for its basic aluminum product is set by world-wide market forces through the London Metal Exchange (LME).¹²

8. Noranda takes electric service from Ameren Missouri under the Large Transmission Service rate schedule. Noranda is the only customer that qualifies for membership in that rate class.¹³ Under rates established in Ameren Missouri's last rate case, File No. ER-2012-0166, which became effective on January 2, 2013,¹⁴ Noranda pays a base electric rate of \$37.94 per MWh, plus an extra amount for the fuel adjustment clause rider, which is currently \$3.50 per MWh, for a total of \$41.44 per MWh.¹⁵ In recognition of the fact that it costs Ameren Missouri less to serve Noranda, as established in the class cost of service studies presented in the last rate case, Noranda's current electric rate is lower than the rate for any other Ameren Missouri customer.

9. Noranda asks the Commission to reduce the rate it pays to \$30 per MWh for a fixed term of ten years, subject only to a rate increase of up to 2 percent at the time of each general rate increase granted to Ameren Missouri by the Commission during this period.¹⁶ That rate would not be subject to Ameren Missouri's fuel adjustment clause. Noranda contends the \$30 rate is "the highest rate Noranda could bear that allows the New Madrid Smelter to be viable."¹⁷

10. Noranda concedes that the \$30 per MWh rate it requests for the next ten years is not based on cost of service principles.¹⁸ Instead, it claims that it is facing a liquidity crisis and that a reduced rate is all it can afford if it is to remain competitive with the rest of the aluminum industry.

11. In his testimony to this Commission, Kip Smith, CEO of Noranda, offered a financial model to explain the company's claim that it is facing a short-term liquidity crisis and a long-term reinvestment challenge. The results of that financial model are reported in Exhibit A to Smith's direct testimony.¹⁹ However, Noranda has designated that exhibit as highly confidential so the details of the financial model cannot be disclosed in this order. Noranda summarizes the results of that model by stating that without actions to improve its liquidity, including obtaining a reduced electric rate, Noranda would consume all its available liquidity by the end of 2015.²⁰

¹² Smith Direct, Ex. 2, Page 8, Lines 10-14.

¹³ Scheperle Rebuttal, Ex. 200, Page 5, Lines 25-26.

¹⁴ Scheperle Rebuttal, Ex. 200, Page 8, Lines 29-31.

¹⁵ Scheperle Rebuttal, Ex. 200, Pages 4-5, Lines 30, 1-2

¹⁶ Smith Direct, Ex. 2, Page 3, Lines 12-17.

¹⁷ Smith Direct, Ex. 2, Page 3, Lines 13-14.

¹⁸ Transcript, Page 231, Lines 18-22.

¹⁹ Smith Direct, Ex. 1.

²⁰ Smith Direct, Ex. 2, Page 12, Lines 3-20.

12. On February 19, one week after Noranda filed its direct testimony in this case, Noranda reported to its investors that as of the end of 2013, it had a total liquidity of \$196 million, representing \$117 million available borrowing capacity under a revolving credit facility plus \$79 million in cash.²¹ At that time, Smith, speaking to investors at an earnings conference call, reported that “today we have a healthy balance sheet and a solid liquidity position.”²²

13. At the end of the first quarter of 2014, Noranda reported to its investors that it had a total liquidity of \$191 million, representing \$140 million of available borrowing capacity plus \$51 million cash.²³ At that time, Dale Boyles, CFO of Noranda, told investors “We believe our flexible capital structure, combined with our focus on managing controllable costs and working capital, provides us with a solid liquidity foundation as we work through the headwinds presented by this portion of the commodity cycle.”²⁴

14. The assumptions used in the financial model that Noranda presented to the Commission to support its assertion that it is facing a liquidity crisis differ substantially from the assumptions used in the financial model that it presented to Moody’s Investors Service on January 31, 2014, less than two weeks before it filed its complaint in this case. Again, the Moody’s presentation is highly confidential so it cannot be described in detail in this order.²⁵ Far from showing a liquidity crisis, Noranda’s presentation to Moody’s showed adequate liquidity throughout the five-year-cash-flow forecast used in the financial model.²⁶

15. The cash-flow forecast Noranda presented to Moody’s is more favorable for two important reasons. First, the more pessimistic forecast Noranda presented to this Commission as a justification for a lower electric rate assumes that aluminum market prices will be lower than the anticipated prices used in the Moody’s model. Second, the model presented to the Commission assumes that Noranda will need to make substantially more in capital investments each year than was assumed for the Moody’s presentation.²⁷

16. For purposes of the cash flow model it presented to the Commission to support its claim of a liquidity crisis, Noranda assumed that future aluminum prices would be predicted by the Forward LME price. However, for the Moody’s presentation, Noranda relied on a price forecast derived from CRU’s Aluminum Market Outlook for December 2013.²⁸ Over the next several years, the CRU forecast of aluminum prices is significantly higher than the Forward LME price.²⁹

²¹ Ex. 108.

²² Ex. 109, page 3.

²³ Ex. 112.

²⁴ Ex. 111, Page 7.

²⁵ The Moody’s presentation is attached to the testimony of Ameren Missouri witness, Robert Mudge, Ex. 102 HC, as Schedule RSM-1HC.

²⁶ Mudge Rebuttal, Ex. 102 HC, Page 13, Lines 16-21.

²⁷ Mudge Rebuttal, Ex. 102 HC, Page 16, Lines 9-12.

²⁸ Mudge Rebuttal, Ex. 102 HC, Page 18, Lines 1-5. The CRU Group is an industry consultant group, based in London that focuses on market analysis. Smith Surrebuttal, Ex. 4, Page 8, Footnote 8.

²⁹ Mudge Rebuttal, Ex. 102 HC, Page 17, Chart at Line 3. The chart and the prices it describes are highly confidential.

17. The Forward LME price is established by the market to allow for trading of aluminum now for a future transaction price.³⁰ It is not a forecast of future aluminum prices, a fact upon which the witnesses for Noranda and Ameren Missouri agree.³¹ Ameren Missouri's witness, Robert Mudge, explained that the CRU forecast is developed by:

one of the most, if not the most respected data-gathering organizations in the industry who put together an econometric model that includes data about supply and demand, inventory, macroeconomic factors, interest rates. They have a large model they use to develop this, and they will be wrong. We don't know if they're too high or too low. But they actually produce something that is intended to forecast the price, by contrast to the LME Forwards."³²

18. If the higher CRU forecast numbers were substituted for the lower Forward LME prices in Noranda's cash flow model, Noranda's liquidity outlook improves substantially.³³ Noranda's witness does not dispute the accuracy of that calculation using that assumption.³⁴

19. Noranda's liquidity projections assume that Noranda will need to make \$100 million per year in sustaining capital investments for the company as a whole, not necessarily for just the New Madrid smelter.³⁵ However, for its Moody's presentation, Noranda assumed that it would make only \$75 million per year in capital investments, which is the company's average level of capital investment over the last three years.³⁶ Noranda told its investors that its sustainable capital expenditures should be in the range of \$65 to \$75 million per year.³⁷ Most of the additional \$25 million in capital expenditures Noranda claims it will need to make in the future are for unidentified growth projects.³⁸

20. Including in the cash flow model the unidentified growth projects, for which Noranda asserts the need to make an additional \$25 million per year in capital expenditures, does not yield any production or cash flow improvements within the five-year period of the forecast, when compared to the cash flow model presented to Moody's. Instead, smelter production in the model presented to the Commission is identical to that in the Moody's presentation, even though a much greater capital expenditure is incurred in the model presented to the Commission.³⁹

³⁰ Transcript, Page 902, Lines 7-17.

³¹ Transcript, Page 974, Lines 1-13. See also, Smith Surrebuttal, Ex. 4, Page 6, Lines 7-13.

³² Transcript, Page 974-975, Lines 18-25, 1-3.

³³ Mudge Rebuttal, Ex. 102, Page 22, Table 6. The table is highly confidential.

³⁴ Transcript, Pages 378-379, Lines 4-25, 1-7.

³⁵ Smith Surrebuttal, Ex. 4, Pages 11 and 12.

³⁶ Transcript, Page 308, Lines 1-14.

³⁷ Ex. 111, Page 6.

³⁸ Mudge Rebuttal, Ex. 102 HC, Page 24, Lines 6-8.

³⁹ Mudge Rebuttal, Ex. 102 HC, Page 28, Lines 6-13.

21. The fundamental demand for aluminum is increasing and will generally support price increases.⁴⁰ But the straight LME aluminum price is not the only factor affecting the price Noranda receives for its aluminum products. The global LME aluminum price is adjusted to include a Midwest Premium that is paid for all aluminum produced in the United States. The inclusion of regional premiums in the LME price is designed to encourage local supply by recognizing transportation differentials between regions of the world.⁴¹ The Midwest Premium is also expected to remain strong.⁴²

22. Noranda contends it must have a reduced electric rate to effectively compete with other aluminum smelters in the United States. The electricity rate paid by Noranda is the fourth highest electricity rate among the nine U.S. smelters in 2013.⁴³ However, the rate Noranda paid for electricity in 2013 was only about three percent above the average rate paid by U.S. smelters.⁴⁴

23. Moreover, the cost of electricity is not the only factor that determines whether an aluminum smelter can compete. The cost of production will vary among smelters based on the cost of goods and services as well as the configuration of the plant. The cost of alumina, labor, and electricity account for 75 to 80 percent of a smelter's total cost, with alumina and electricity each comprising about one-third of the cost of production.⁴⁵ When the total cost of production at each smelter is taken into account, at current electricity rates, the New Madrid smelter operates at a total cost that is less than the average cost for a U.S. smelter. In fact, at current rates, it is the third cheapest producer of aluminum in the United States, largely because it benefits from the cheapest alumina supply in the nation. If Noranda were granted the \$30 rate it requests, it would have the lowest total costs of any smelter operating in the United States.⁴⁶

24. At the hearing, Smith testified that a few days before the hearing an event occurred that had a bearing on Noranda's liquidity position.⁴⁷ Smith's testimony was offered in camera so the details of the event cannot be described in this order. Even though the testimony was offered in camera, counsel for the Complainants said, in open court, during her opening statement, that "Noranda is currently out of cash and is paying its daily expenses by borrowing against an asset-backed loan. So the paychecks that will be issued this week to employees will be funded by debt."⁴⁸ Again, later in her argument, she said: "But the evidence shows that Noranda's clearly in a liquidity crisis. It's out of cash. It's paying its daily expenses on its asset-based loan, and its paying its employees from borrowed money."⁴⁹ Obviously, statements of counsel are not evidence. The Commission cites those statements merely to provide context for a matter that must otherwise remain highly confidential.

⁴⁰ Transcript, Page 248, Lines 17-20. See also, Noranda's 1st Quarter Earnings Conference Call, Ex. 112.

⁴¹ Transcript, Pages 557-558, Lines 17-25, 1-2.

⁴² Transcript, Pages 363-364, Lines 3-25, 1-3.

⁴³ Fayne Direct, Ex. 8, Page 4, Lines 18-21.

⁴⁴ Mudge Rebuttal, Ex. 102, Page 43, Lines 18-20.

⁴⁵ Fayne Direct, Ex. 8, Pages 3-4, Lines 20-23, 1.

⁴⁶ Mudge Rebuttal, Ex. 102, Page 49, Lines 1-19.

⁴⁷ Transcript, Pages 187-188, Lines 23-25, 1-18.

⁴⁸ Transcript, Page 49, Lines 19-23.

⁴⁹ Transcript, Page 66, Lines 6-10.

25. The facts of the event as actually described in the evidence are much less dire than they would appear from the statements of counsel. Noranda's cash flows can vary depending on the time of the month depending upon when its bills are due and when payments are received from customers that like to pay at the end of the month.⁵⁰ The fact that the event occurred does not have any broader implications on Noranda's long-term liquidity position.⁵¹ Noranda has not informed its shareholders of any liquidity crisis or the liquidity event through an 8-K filing with the Securities and Exchange Commission.⁵² The Commission finds that the event described by Smith does not change the analysis of Noranda's liquidity position as found by the Commission elsewhere in this order.

26. This is not the first time that Noranda has argued to the Commission that it must have a lower electric rate if its New Madrid smelter is to survive. In its Report and Order resolving Ameren Missouri's 2010 rate case, ER-2010-0036, the Commission noted that a nonunanimous stipulation and agreement that was opposed by one of the parties would have given Noranda a rate reduction, while all other Ameren Missouri customers paid substantially higher rates. The Commission stated "MIEC, and in particular, Noranda, attempt to justify these results by claiming that Noranda needs special rate consideration to remain competitive with other aluminum smelters in the United States, lest it be forced to close, resulting in economic devastation to Missouri."⁵³

27. In 2010, the Commission rejected the stipulation and agreement that would have given Noranda a rate reduction while increasing rates paid by all other customers.⁵⁴ The New Madrid smelter did not close because of that decision, but in 2011, Noranda's board of directors voted to give its shareholders a special dividend totaling \$44 million.⁵⁵

28. Noranda was purchased from its previous owner by Apollo Management, L.P., a private equity investment fund, on May 18, 2007. In a deal valued at \$1.165 billion, Apollo paid \$214.2 million in equity and the balance was from debt secured by Noranda assets and operations. Twenty-five days later, on June 12, 2007, Noranda borrowed money to pay Apollo a dividend of \$214.2 million. Thereafter, while still owning stock in the company, Apollo has fully recovered its investment and currently has no equity invested in the company. Noranda was left with a capital structure of nearly 100 percent debt.⁵⁶

⁵⁰ Transcript, Pages 188-189, Lines 18-25, 1-8. Smith's testimony was offered in camera, but the statement as described does not contain any confidential information.

⁵¹ Transcript, Page 909, Lines 1-11. Mudge offered a more detailed explanation of the possible causes of the event and their meaning for Noranda later in his testimony but that testimony was offered in camera and cannot be described in this order. Mudge's in camera testimony can be found at Pages 933, 934, 954, and 955 of the transcript.

⁵² Transcript, Page 372, Lines 4-10.

⁵³ Ex. 120, Page 90.

⁵⁴ Ex. 120, Page 92.

⁵⁵ Mudge Rebuttal, Ex. 102, Page 39, Table 9.

⁵⁶ Mudge Rebuttal, Ex. 102, Pages 36-37, Lines 7-18, 1-4.

29. But Apollo was not done taking cash out of Noranda. On June 13, 2008, Noranda paid Apollo another dividend of \$100.7 million. Noranda conducted an Initial Public Offering (IPO) of one third of its equity in Noranda on May 19, 2010. After the IPO, Apollo received additional dividends of \$107.9 million, as well as \$151.1 million from the secondary sale of Noranda stock. In all, Apollo has realized dividends of \$422.8 million and realized stock sale proceeds of \$151.1 million, while still retaining 34 percent of Noranda's stock. In addition, Noranda has paid Apollo \$31 million in management fees since the acquisition.⁵⁷ As of the end of 2013, Noranda's ratio of long term liabilities to book capitalization is 87 percent.⁵⁸

30. Because of its debt, Noranda must pay roughly \$50 million per year in interest payments.⁵⁹

31. The Complainant's proposal to shift some of Noranda's electric costs to Ameren Missouri's other customers for a ten-year period gives Noranda a subsidy of at least \$331 million. That amount is calculated by taking the difference between Noranda's current rate base of \$37.94 per MWh and its proposed rate of \$30.00 per MWh and multiplying that difference by Noranda expected electric load of 4.169 million MWh per year, for ten years.⁶⁰

32. The basic subsidy of \$331 million likely understates the actual subsidy Noranda would receive over the ten years it proposes to receive a reduced rate, because that calculation assumes no increases in Ameren Missouri's base rates over ten years and ignores the existence of Ameren Missouri's fuel adjustment clause. The Complainants proposed that Noranda be exempted from the fuel adjustment clause and that any increases in base rates be limited to two percent per increase. As a result, as the rates Ameren Missouri charges the rest of its customers increase, the amount of the subsidy received by Noranda would also increase.⁶¹

33. If it is assumed that Ameren Missouri's rates actually increase by six percent in June 2015, and six percent every 36 months thereafter, the total subsidy grows to \$468 million. If it is assumed that Ameren Missouri's rate increases six percent every 24 months, the subsidy would be \$529 million.⁶² Of course, no one can know with certainty how much Ameren Missouri's costs, and consequently its rates, may rise over the next ten years, so the exact amount of the subsidy given to Noranda under the Complainants' proposal cannot be known.

34. Moreover, as a practical matter, it is unlikely that the subsidized rate given to Noranda could be ended after ten years. By that time, the rate Noranda would be paying would likely be even further below Ameren Missouri's actual cost to serve the company. If Ameren Missouri's general rates increased by six percent every other year, while Noranda's rates were allowed to increase by only two percent every other year, at the end of ten years, the rate Noranda pays would be nearly 34 percent below its cost of service.⁶³ Clearly, Noranda would not be willing, or able, to withstand a 34 percent rate increase in year eleven to return to cost-based rates. As a result, the subsidy could, in effect, become permanent.

⁵⁷ Mudge Rebuttal, Ex. 102, Page 38, Lines 8-19.

⁵⁸ Mudge Rebuttal, Ex. 102, Page 37, Lines 8-9.

⁵⁹ Transcript, Page 321, Lines 14-19.

⁶⁰ Michels Rebuttal, Ex. 104, Page 6, Lines 5-9.

⁶¹ Michels Rebuttal, Ex. 104, Page 6, Lines 9-23.

⁶² Michels Rebuttal, Ex. 104, Page 7, Lines 1-9.

⁶³ Davis Rebuttal, Ex. 100, Page 7, Lines 18-22.

35. The foundation for the Complainant's claim that the subsidy would benefit Ameren Missouri's other customers as well as Noranda is an assertion that while the rates paid by other customers would have to go up to pay the subsidy, those rates would climb even higher if the subsidy were not paid and Noranda closed the New Madrid smelter and stopped taking electricity from Ameren Missouri.

36. The Complainant's witness, Maurice Brubaker, calculated that Ameren Missouri's net revenue would be reduced by approximately \$60 million per year if the New Madrid smelter closed. In contrast, if the Complainant's proposal was implemented and the smelter remained open while paying a lower rate, Ameren Missouri's net revenue would be reduced by only \$47.7 million, resulting in a net benefit to other customers.⁶⁴

37. Brubaker's calculation was based on the calculation by another Complainants' witness, James Dauphinais, of the net costs that Ameren Missouri would avoid if the smelter closed and Noranda no longer took power from Ameren Missouri. In his direct testimony, Dauphinais estimated those net avoided costs to be \$27.05 per MWh.⁶⁵ Brubaker then estimated that the difference between the avoided cost of \$27.05 per MWh and the \$30.00 per MWh would provide a benefit to other rate payers of roughly \$12 million per year. To achieve the same \$12 million per year benefit to other ratepayers, the same \$2.95 difference would have to be added to whatever avoided cost was calculated.⁶⁶

38. In his surrebuttal testimony, Dauphinais revised his calculation of Ameren Missouri's avoided cost to arrive at an estimate of between \$27.91 and \$28.49 per MWh.⁶⁷ That estimate is still below the \$30 per MWh rate for Noranda proposed by the Complainants, but to achieve the \$12 million per year benefit originally described by Brubaker, the rate would need to increase to between \$30.86 and \$31.44 per MWh.

39. Using different inputs and relying on more recent price assumptions, Ameren Missouri's witness, Matt Michels estimated Ameren Missouri's avoided costs to be \$33.89 per MWh as of May 1, 2014. To give other ratepayers the \$12 million annual benefit initially described by Brubaker, Noranda's rate would need to be set at \$36.84 per MWh, just \$1.10 per MWh less than Noranda's current base rate.⁶⁸

40. Similarly, Staff's witness, Sarah Kliethermes, using different inputs and different price assumptions, calculated that Ameren Missouri's cost to serve Noranda at the time she prepared her testimony is roughly \$31.50.⁶⁹ She estimated that a rate set at that amount would allow Ameren Missouri to recover its costs at that time, but would not contribute to Ameren Missouri's common costs. Thus, in order for other customers to be better off with Noranda on Ameren Missouri's system than they would be if Noranda left the system, Noranda would have to pay some amount greater than \$31.50 for its electric service. To give other ratepayers the \$12 million annual benefit of contributions to common costs previously described would require a rate to be set at no less than \$34.45 per MWh.

⁶⁴ Brubaker Direct, Ex. 16, Pages 6-7, Lines 10-21, 1-4.

⁶⁵ Dauphinais Direct, Ex. 13, Page 3, Lines 16-19.

⁶⁶ Michels Rebuttal, Ex. 104, Page 29, Lines 5-10.

⁶⁷ Dauphinais Surrebuttal, Ex. 15, Page 5, Lines 17-23

⁶⁸ Michels Rebuttal, Ex. 104, Page 29, Lines 10-15.

⁶⁹ Transcript, Page 791, Lines 16-20.

41. Ms. Kliethermes' calculation is the most persuasive of the three calculations. Mr. Dauphinais' calculation was less persuasive because his initial calculation, presented in his direct testimony, relies heavily on a single year of electric price information from a period when such prices were relatively depressed.⁷⁰ Electric prices are the largest component, approximately 95 percent, of the calculation.⁷¹ In his revised calculation for his surrebuttal testimony, he relies on a three-year average of those prices, but purports to normalize away the higher electric costs experienced in the unusually cold winter of January – March 2014.⁷² Such normalization is not appropriate because while the extreme cold associated with a polar vortex may not reoccur frequently, other, not necessarily weather-related, anomalies will occur and have an impact on electric prices.⁷³ Normalizing the one such anomaly that happened to occur in the three years examined unfairly understates the expected electric prices.

42. None of the proposed measurements of cost to serve seek to determine Ameren Missouri's fully embedded cost to serve Noranda. That amount was determined in the class cost of service study presented in Ameren Missouri's last rate case and was in the \$36 range at that time.⁷⁴ No party challenges that determination in this case.

43. The value of all three calculations of Ameren Missouri's cost to serve Noranda is limited because they are based on historical values, with no attempt to determine how the cost to serve might change over the next ten years for which Noranda asks that it be given a non- cost-based rate. Dauphinais testified that he was not even attempting to project what costs might be in the future; he was merely attempting to determine a reasonable cost at this time, with the understanding that Noranda's rates would be reviewed and adjusted in Ameren Missouri's next rate case.⁷⁵

44. Following questioning by Public Counsel, Smith offered two commitments that Noranda would make if the Commission granted it the reduced rate it sought. First, he committed to continue to employ 888 full-time employees at the smelter while the special rate remains in effect. Second, he committed to invest a total of \$350 million in capital expenditures over the ten-year period of the rate design.⁷⁶

Conclusions of Law

A. Union Electric Company, d/b/a Ameren Missouri is an electrical corporation as that term is defined at Section 386.020(15), RSMo (Supp. 2013). As an electrical corporation, Ameren Missouri is subject to regulation by this Commission as described in Chapters 386 and 393, RSMo.

B. Noranda Aluminum, Inc., is not a regulated utility and is not subject to the jurisdiction of this Commission.

⁷⁰ Dauphinais Surrebuttal, Ex. 15, Page 8, Lines 20-21.

⁷¹ Transcript, Page 904, Lines 11-15.

⁷³ Transcript, Pages 714-716.

⁷⁴ Transcript, Page 754, Lines 9-15.

⁷⁵ Transcript, Page 712, Lines 4-12.

⁷⁶ Transcript, Pages 629-630, Lines 25, 1-12.

C. Section 386.390.1, RSMo 2000 establishes the standards for bringing complaints before this Commission. The relevant part of section states:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation of any provision of law, or of any rule or order or decision of the commission;

The section goes on to state:

Provided that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or president or chairman of the board of alderman or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

This complaint alleges that the rate Ameren Missouri charges to Noranda for electricity is unreasonable because Noranda cannot afford to pay that rate. As required by the second part of the statutory section, the complaint is signed by not less than twenty-five customers, and, therefore, complies with the statutory requirements.

D. This action is a complaint against Ameren Missouri. So, the Complainants, as the party asserting the affirmative of an issue, bear the burden of proving the allegations made in their complaint.⁷⁷

E. The complaint alleges that the rate Ameren Missouri charges Noranda, a rate established by this Commission in Ameren Missouri's most recent rate case, is now unreasonable because without a reduction in its electric rates, Noranda would have insufficient liquidity to remain viable and would be subject to closure. Those are the allegations the Complainants must prove to prevail in their complaint. But even if the Complainants are able to prove those allegations, there are other questions about whether the Commission can grant the relief they request.

F. Section 393.130, RSMo (Supp. 2013) establishes the requirements for the provision of service by regulated utilities. In general, it requires that all charges for utility service must be "just and reasonable" and not more than allowed by law or order of this Commission. Subsection 2 of that statute further states:

⁷⁷ *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n*, 116 S.W.3d 680 (Mo. App. W.D. 2003). See also, *AG Processing, Inc. v. KCP&L Greater Missouri Operations Company*, 385 S.W.3d 511 (Mo. App. W.D. 2012).

No ... electrical corporation ... shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand collect or receive from any person or corporation a greater or less compensation for ... electricity ..., except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Subsection 3 adds:

No ... electrical corporation ... shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

G. In sum, the statute says that utilities cannot give any “undue or unreasonable” preference to any particular customer, or class of customers. The leading case interpreting the meaning of “undue or unreasonable” preference is *State ex rel. Laundry v. Public Service Commission*,⁷⁸ a 1931 decision by the Missouri Supreme Court. The *Laundry* decision arose from a complaint brought before the Commission by two laundry companies contending that they should be allowed to receive water service at the same reduced rate made available to ten manufacturing customers. The court found that the special manufacturing rate had been put in place by the utility to try to draw more business into its service area. In its decision, the Supreme Court found that the laundries were similarly situated to the manufacturing customers and should have been allowed to take water at the reduced manufacturer’s rate.

H. The *Laundry* decision merely decides that in the facts described in that case, the laundries should have qualified for the industrial rate. However, Ameren Missouri cites to an even earlier Commission decision that the *Laundry* court quoted extensively for the proposition that all economic development rates are forbidden by the controlling statute. That Commission decision, *Civic League of St. Louis v. City of St. Louis*,⁷⁹ does indeed sharply criticize a water rate imposed by the City of St. Louis for the purpose of encouraging manufacturing enterprises to locate within the city, and orders the city to revise those rates to avoid discrimination. However, the criticism was that the rates imposed by the City of St. Louis were set below the cost of service and that they were unreasonably low. In the words of the Commission:

The establishment of the truth of such averment (that rates to manufacturers were below the cost of service) would reveal not only unquestionably unjust discrimination, but also an unreasonable low rate to this class (the manufacturers), and intolerable oppression upon the general metered water users in that they would be compelled to pay in part for water and service furnished to the favored class. The exercise of power crystallized into legislation that unjustly discriminates between users of water in this manner, in

⁷⁸ 34 S.W.2d 37 (Mo 1931)

⁷⁹ 4 Mo. P.S.C. 412 (1916).

effect deprives those discriminated against of the use of their property without adequate compensation or due process of law, and turns it over to the favored class. It is in essence a species of taxation which takes the private property of the general or public metered water users for the private use of metered water users engaged in manufacturing. This is an abuse of power.⁸⁰

While this decision speaks more directly to the propriety of below-cost rates, it does not necessarily contradict the principle set forth in *Laundry* that the Commission may set preferential rates as long as the preference is reasonably related to the cost of service and is not unduly or unreasonably preferential.⁸¹ No party has identified any subsequent court decision that would go as far as proscribing all economic development type rates.

I. Instead, the courts that have examined this issue have made fact-based inquiries about the statutory proscription against unjust and unreasonable rates and undue or unreasonable preference or disadvantage.⁸² So how does the Commission determine whether a given rate is unduly or unreasonably preferential or disadvantageous? In a general rate case, the parties will submit one or more class cost of service studies. Such studies are designed to determine the amount of cost that each class of customer causes, and then recommend how rates should be established to maintain the principle that those causing the costs should be responsible for paying rates sufficient to recover those costs.

J. That does not mean all customers should pay the same rate. On the contrary, a single rate for all customers would likely be unjust because different customers cause different amounts of costs. So, Ameren Missouri's current rates recognize several different rate classes, including the Large Transmission Service class, of which Noranda is the only member. However, the rates charged to each customer class are firmly based on cost-causation principles.

K. The Complainants argue that the Commission should throw out cost causation principles in order to allow Noranda a lower rate based not on costs, but rather on what it says it can afford to pay. The Complainants must shoulder a very heavy burden to show that such a rate would not be unduly or unreasonably preferential.

L. Ameren Missouri also challenges the sufficiency of the Complainant's case on the basis that they are attempting to alter rates based on consideration of only a single factor, in other words, they are asking the Commission to engage in single-issue ratemaking.

M. At its heart, the argument against single-issue ratemaking is based on the requirement that the Commission examine all relevant factors. That requirement is based on section 393.270.4, RSMo 2000, which states:

In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question, although not set forth in the complaint and not within the allegations contained therein, ...

⁸⁰ *Civic League* at 455-456.

⁸¹ "... that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination." *Laundry* at 45.

⁸² For example see, *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290 (Mo. App. W.D. 2005)

In interpreting that statute, Missouri's courts have found that when adjusting rates, the Commission is required to consider all relevant factors.⁸³

N. The Complainants contend that because they are not asking the Commission to change Ameren Missouri's revenue requirement there is no need to produce evidence to establish the utility's current cost of service. Instead, they believe the only relevant factor is Noranda's ability to pay its electric rate. However, if Ameren Missouri's revenue requirement is to remain unchanged, then any reduction in the amount of revenue Ameren Missouri is allowed to collect from Noranda must necessarily be collected from the other rate-paying customers.

O. Public Counsel argues that the Commission could simply reduce Noranda's rate without collecting the resulting shortfall from other customers; essentially requiring Ameren's shareholders to absorb that cost. As Public Counsel points out, there is nothing in Missouri law that would allow the rates paid by other ratepayers to be automatically raised when Noranda's rates are decreased.⁸⁴

P. Public Counsel suggests that Ameren Missouri somehow has a burden to respond to Noranda's complaint by establishing that rates for other ratepayers should be increased to make up for Noranda's rate decrease. However, this is the Complainants' complaint, and only the Complainant's have a burden to prove their complaint. That burden cannot shift to the respondent utility.⁸⁵ Thus, any failure to establish that the rates Ameren Missouri charges to its other customers should be increased is a failure by the Complainants to meet the burden that is placed on them.

Decision

The Complainants have the burden of proving the rate Noranda currently pays, the rate established by this Commission in Ameren Missouri's 2012 rate case, is now unreasonable because without a reduction in its electric rates, Noranda would have insufficient liquidity to remain viable and would be subject to closure. Noranda framed this burden when it argued that the Commission must conclude its smelter is crucial to Missouri's economy, that the smelter cannot be sustained without the proposed reduced rate, and other ratepayers will benefit more from the reduced rate that they would from Noranda leaving Ameren Missouri's system. The Commission is fully persuaded that Noranda is important for the economy of southeast Missouri and for Missouri as a whole. However, after considering all the evidence presented, the Commission concludes that the Complainants have not met their burden in that they have not shown Noranda is suffering from a liquidity crisis, and they have not shown Ameren Missouri's other customers will be better off if the Commission granted the requested relief.

⁸³ *State Ex Rel. Missouri Water Co. v Pub. Serv. Comm'n*, 308 S.W.2d 704, 718-719 (Mo. 1957). See also, *State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm'n*, 585 S.W.2d 41 (Mo.

⁸⁴ Post Hearing Brief of the Office of the Public Counsel, Page 7. The Commission acknowledges that OPC's position may have changed after the briefs were filed, as is apparent through the stipulations filed in July and August.

⁸⁵ *AG Processing, Inc. v. KCP&L Greater Missouri Operations Co.*, 385 S.W.3d 511 (Mo. App. W.D. 2012).

Liquidity Crisis

The Complainants have not established that Noranda is facing a liquidity crisis. By filing its complaint and demanding an expedited procedural schedule, and by proclaiming at the hearing that Noranda had run out of cash, the Complainants sought to show ~~imply~~ that Noranda was facing an emergency that must be addressed quickly if the New Madrid smelter is to be saved. However, the evidence presented at the hearing did not establish a short-term need for immediate rate relief.

Indeed, the rate relief demanded by Noranda is not designed to address a short-term crisis. Rather, in the complaint, Noranda seeks a subsidized rate that it insists must remain in place for a period of ten years if the smelter is to remain viable. The complaint does not suggest that after ten years Noranda would be able to return to a cost-based rate, and the evidence suggests that by that time Ameren Missouri's rates would have increased to a level that would make an immediate return to such rates highly unlikely. Therefore, the rate Noranda would likely be a permanently subsidized rate financed by Ameren Missouri's other ratepayers.

Even when considering the longer-term viability of the smelter, the Complainants have failed to prove that a subsidized rate is needed. The financial model that Noranda presented as the basis for its claim for subsidization is severely flawed. By relying on Forward LME prices rather than more realistic forecasts from CRU that take into account a strong fundamental demand for aluminum, Noranda's model understates the likely future price of aluminum. Further, the financial model that Noranda submitted to this Commission assumes that the company will need to make \$25 million per year in additional unidentified capital investments that it has not made in the past and that Noranda did not claim a need to make when it described its financial projections to Moody's a few weeks before it filed this complaint.

In sum, the Commission believes the financial projections Noranda has presented to its investors, and to Wall Street in general, cast considerable doubt on the financial projections it presented to this Commission.⁸⁶

⁸⁶ To the extent that Noranda is experiencing financial liquidity problems, it seems likely that these problems are largely self-inflicted. The former owner of Noranda, and still its principal shareholder, Apollo Management, L.P., took \$422.8 million in cash dividends from the company after it acquired the company. Noranda had to borrow money to pay the dividends, leaving it with a current debt to equity ratio of 87 percent. Under those circumstances it is not surprising that Noranda has some cash liquidity issues, especially considering the roughly \$50 million per year in interest payments Noranda must pay on that debt.

Benefit of Reduced Rate

The Complainants argue that Ameren Missouri's other ratepayers would be better off if Noranda pays a \$30 per MWh rate, with limited upward adjustments, for ten years than they would be if the smelter closes and Noranda no longer makes a contribution to Ameren Missouri's common costs. But the evidence shows that Ameren Missouri's marginal cost to serve Noranda today is above \$30 per MWh, likely in the range of \$31.50. Even Noranda's witnesses concede that the marginal cost would likely increase in future years and would need to be adjusted in future rate cases. That means the Complainants are asking the Commission to establish a rate for Noranda that would be subsidized by Ameren Missouri's other ratepayers and that would not benefit those other ratepayers. Thus, even if Complainants had succeeded in proving a liquidity crisis, they failed to establish that Ameren's other customers would benefit from the rate reduction Noranda proposed.

Although Noranda's witnesses testified that it absolutely needs a \$30 per MWh rate, sustained over ten years with only limited increases, to remain viable, the Complainants have also suggested that the Commission could craft some sort of unspecified compromise terms under which Noranda's electric rate is modified.⁸⁷ Because this is a complaint, however, the Complainants bear the burden of proof regarding the relief they seek in that complaint, not some other relief that the Commission might craft on their behalf.

Missouri law forbids a utility to charge a rate that gives an undue or unreasonable preference to any particular customer or class of customers, and the Commission cannot lawfully approve such a rate. Since the Complainants are asking the Commission to order Ameren Missouri to charge Noranda a rate that is not based on the utility's cost to serve that customer, they bear the burden of proving that such a subsidized rate is just and reasonable and is not an undue or unreasonable preference to a particular customer. The Complainants have not carried that burden.

The Commission usually determines whether a rate design - the means by which the responsibility to pay the utility's revenue requirement is distributed among the utility's customer classes - is just and reasonable by examining a class cost of service study to determine the amount of costs that should be assigned to each class on the principle that the class that causes the cost should pay that cost. The Complainants did not present a class cost of service study in this case, nor did any other party. The Commission will not state that a class cost of service study is absolutely indispensable to sustain a complaint case, but here it would be instructive. In the absence of a class cost of service study, it is impossible to determine whether Ameren Missouri's current rates are now unjust and unreasonable.

⁸⁷ After the record closed, after briefs were filed, and after the Commission publically began its deliberations at an agenda meeting, the Complainant's and other parties filed a series of non-unanimous stipulations and agreements, which have been formally opposed by Ameren Missouri and by Staff. Those stipulations and agreement propose specific compromise terms by which Noranda's rates would be set at a level above \$30 per MWh, subject to various conditions and commitments. Since those stipulations and agreements have been opposed, under Commission Rule 4 CSR 240-2.115(2)(D), they can only be treated as revised positions of the signatory parties. The Commission finds their proposals intriguing and encourages the parties to continue to pursue negotiations on a compromise position as it could be considered in Ameren Missouri's current rate case, File No. ER-2014-0258.

Giving a subsidized rate to Noranda would necessarily mean that Ameren Missouri's other customers would ultimately have to foot the bill.⁸⁸ No doubt the New Madrid smelter is very important to the economic health of the entire state of Missouri. The Commission sympathizes with Noranda's employees and the residents of the New Madrid area who testified at the local public hearings in this case. The Commission certainly does not want the smelter to close. But the Commission determines that the evidence presented in this case does not warrant a departure from cost-of-service ratemaking. The Complainants have not demonstrated a liquidity crisis nor adequately demonstrated that Ameren Missouri's remaining ratepayers would be better off if Noranda took service at its requested rate than they would be if Noranda exited Ameren Missouri's system. Finally, and importantly, a request for an economic development subsidy of this magnitude is more properly directed to the Missouri General Assembly.

After carefully considering all the evidence and the arguments of the parties, the Commission finds and concludes that the rate design complaint must be denied and dismissed.

THE COMMISSION ORDERS THAT:

1. The complaint brought by Noranda Aluminum, Inc. and the other complainants is denied and dismissed.
2. This report and order shall become effective on September 19, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall and
Rupp, CC., concur;
and certify compliance with the provision of
Section 536.080, RSMo

Dated at Jefferson City, Missouri, on this
20th day of August, 2014.

⁸⁸ Even if Public Counsel's argument were accepted and it were determined that rates on other customer classes could not be raised in this complaint case, Ameren's shareholders would only be required to absorb that cost until new rates are established in Ameren Missouri's next general rate case, which is already pending and will likely result in new rates in May of 2015.

In the Matter of Ameren Missouri's Application for	)	<u>File No. ET-2014-0350</u>
Authorization to Suspend Payment of Solar Rebates	)	Tariff No. YE-2014-0494

ELECTRIC. §21. Refunds. The Commission approved an electric company's application and accompanying tariff providing when the electric company must cease payment on solar rebate applications.

ORDER REGARDING TARIFF

Issue Date: August 20, 2014

Effective Date: September 19, 2014

Procedural History

On May 23, 2014¹, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") filed the above-referenced application. The application included a tariff bearing an effective date of July 22, which Ameren Missouri later extended to August 21.²

Ameren Missouri states that it should be entitled to suspend payment of certain solar rebates due to the Commission's approval of a Non-Unanimous Stipulation in File No. ET-2014-0085. As such, the Commission allowed the parties in File No. ET-2014-0085 to become parties in this file without the need to file motions to intervene. The Commission also allowed an opportunity for other potential parties to intervene. The Commission received no further requests for intervention.

Ameren Missouri states that the Commission should permit it to cease paying solar rebates once it has actually paid, and not simply committed to pay, \$91.9 million in solar rebate applications. Ameren Missouri further asks the Commission to find that it calculated the 1% maximum average retail rate increase found in Section 393.1030 ("1% cap") correctly.

Brightergy, LLC ("Brightergy") filed comments on June 20. Brightergy states that it does not object to Ameren Missouri's request once Ameren Missouri has actually paid the \$91.9 million cap established in File No. ET-2014-0085. But Brightergy points out that Ameren Missouri's request for the Commission to confirm Ameren Missouri's calculation of the 1% cap in Section 393.1030 is contrary to the stipulation and no longer required. In other words, the \$91.9 million has replaced the 1% cap per the stipulation in ET-2014-0085.

Missouri Solar Energy Industries Association ("MOSEIA") also responded on June 20. MOSEIA claims that Ameren Missouri has incorrectly calculated the 1% cap by including hypothetical revenue requirements associated with future wind and solar projects. So, MOSEIA maintains, those facilities do not count toward the cap, and the Commission should reject the tariff.

¹ Calendar references are to 2014.

² In Case No. 14AC-CC00316, the Circuit Court of Cole County, Missouri issued a preliminary writ of prohibition on June 23. The writ prohibited the Commission from ruling on this application. The court vacated its writ on August 15.

The Staff of the Commission responded on June 23. Staff recommends that the Commission approve the tariff, and approve the application. Further, Staff recommends that the Commission order Ameren Missouri to file notice in this file once it has paid the required \$91.9 million of solar rebates.

Discussion

The operative statute in this case is Section 393.1030.3 RSMo (Supp. 2013). Section 393.1030.3 provides:

If the electric utility determines the maximum average retail rate increase provided for in subdivision (1) of subsection 2 of this section will be reached in any calendar year, the electric utility shall be entitled to cease paying rebates to the extent necessary to avoid exceeding the maximum average retail rate increase if the electrical corporation files with the commission to suspend its rebate tariff for the remainder of that calendar year at least sixty days prior to the change taking effect. The filing with the commission to suspend the electrical corporation's rebate tariff shall include the calculation reflecting that the maximum average retail rate increase will be reached and supporting documentation reflecting that the maximum average retail rate increase will be reached. The commission shall rule on the suspension filing within sixty days of the date it is filed. If the commission determines that the maximum average retail rate increase will be reached, the commission shall approve the tariff suspension (emphasis supplied).

To summarize, Section 393.1030.3 allows an electric utility to file "with the commission to suspend its rebate tariff . . . sixty days prior to the change taking effect" if it determines that the "maximum average retail; rate increase . . . will be reached in any calendar year . . . " If the Commission finds that the maximum average retail rate increase will be reached, it shall approve the tariff suspension within those sixty days. Here, the parties reached a Non-Unanimous Stipulation and Agreement as to the amount of solar rebates to be paid in lieu of calculating the 1% rate cap.

The Commission finds that the tariff Ameren Missouri filed complies with the Non-Unanimous Stipulation and Agreement in File ET-2014-0085. If a party to the Stipulation and Agreement or any other party desires to challenge the Stipulation and Agreement they may avail themselves of the complaint process here at the Missouri Public Service Commission.

THE COMMISSION ORDERS THAT:

1. The following tariff sheet filed by Union Electric Company d/b/a Ameren Missouri May 23, 2014, and assigned Tariff No. YE-2014-0494, is approved to become effective on September 19, 2014:

MO. P.S.C. Schedule No. 6

3rd Revised Sheet No. 88, Cancelling 2nd Revised Sheet No. 88

2. Nothing in this order shall be considered a finding by the Commission of the reasonableness or prudence of the expenditures herein involved, or of the value for ratemaking purposes of the properties herein involved, or as acquiescence in the value placed on said property.

3. The Company shall file a notice in this case, with supporting documentation, when it has reached the \$91.9 million rebate payment limit specified in the Non-Unanimous Stipulation in File No. ET-2014-0085.

4. This order shall become effective on September 19, 2014.

5. This file shall be closed on September 20, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur.

Pridgin, Deputy Chief Regulatory Law Judge

Noranda Aluminum, Inc., et al.,)	
)	
Complainants,)	
)	
v.	)	<u>File No. EC-2014-0223</u>
)	
Union Electric Company)	
Ameren Missouri)	
)	
Respondent.)	

ELECTRIC. §20. Rates.

RATES. §62. Initiation of rates and rate changes. The Commission denied the complaint of public utility customers, which alleged that the public utility's rates were unjust and unreasonable, because the relief requested was selective, and the customers' evidence of overearnings was limited and addressed less than all relevant factors.

REPORT AND ORDER**Issue Date: October 1, 2014****Effective Date: October 31, 2014****APPEARANCES**

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And

Edward F. Downey and Carole L. Iles. Attorneys at Law, Bryan Cave, LLP, 221 Bolivar St., Suite 101, Jefferson City, Missouri 65109.
For the Complainants.

Thomas M. Byrne. Director-Assistant General Counsel, **Wendy K. Tatro.** Director-Assistant General Counsel, and **Matt Tomc.** Corporate Counsel, Ameren Missouri, P.O. Box 66149, St. Louis, Missouri 66149,
And

James B. Lowery. Attorney at Law, Smith Lewis, LLP, 111 S. 9th Street, Suite, 200, Columbia, Missouri 65205.
For Union Electric Company, d/b/a Ameren Missouri.

Kevin A Thompson. Chief Staff Counsel, **Alexander Antal.** **Whitney Hampton.** **Akayla Jones.** Legal Counsel, and **Jamie Myers.** Rule 13 Certified Law Student, 200 Madison Street, Ste. 800, Jefferson City, Missouri 65102-0360.
For the Staff of the Missouri Public Service Commission.

Dustin J. Allison. Public Counsel, **Christina Baker.** Senior Public Counsel, and **Marc D. Poston.** Senior Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102-2230.
For the Office of the Public Counsel and the Public.

Thomas R. Schwarz, Attorney at Law, Blitz, Bardgett & Deutsch L.C., 308 East High St., Suite 301, Jefferson City, Missouri 65101.
For the Missouri Retailers Association.

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For Missouri Industrial Energy Consumers.

CHIEF REGULATORY LAW JUDGE: **Morris L. Woodruff**

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

The Commission finds and concludes that the Complainants have failed to meet their burden of proving that Ameren Missouri's current rates are no longer just and reasonable. The Commission, therefore, denies and dismisses the complaint.

Procedural History

On February 12, 2014,¹ Noranda Aluminum, Inc., joined by 37 individual customers of Union Electric Company, d/b/a Ameren Missouri, filed an excess earnings complaint and request for expedited review. The complaint asked the Commission to revise the rate Ameren Missouri is allowed to charge its customers by resetting those rates to a level that is just and reasonable.

As required by Commission rule 4 CSR 240-2.070, the Commission notified Ameren Missouri of the filing of the complaint and directed the utility to file its answer no later than March 17. Ameren Missouri filed its answer on March 17, along with a motion to dismiss the complaint. The Commission denied that motion on April 16.

¹ Date references are to 2014 unless otherwise indicated.

The Commission allowed the following parties to intervene: Consumers Council of Missouri; AARP; Continental Cement Company; the City of O'Fallon and the City of Ballwin; Wal-Mart Stores East, L.P. and Sam's East; the Missouri Industrial Energy Consumers; River Cement Company; and the Missouri Retailers Association. In compliance with an expedited procedural schedule, the parties prefiled multiple rounds of testimony. In addition, the Commission held three local public hearings to collect testimony from interested members of the public.

The Complainants and various intervening parties proposed an expedited procedural schedule that would have led to an evidentiary hearing beginning on June 16. Ameren Missouri proposed to fold the complaint into a general rate case that it planned to file in July. Ultimately, an evidentiary hearing was held on July 28 and 29. The parties filed initial post-hearing briefs on August 15, with reply briefs filed on August 29.²

Findings of Fact

1. Union Electric Company is an investor-owned electric utility, subject to the jurisdiction of this Commission and is the largest electric utility in Missouri.³

2. Ameren Missouri's current electric rates were established by the Commission and made effective on January 1, 2013, in the company's last general rate case, which is contained in Commission File Number ER-2012-0166.

3. In preparing to file a request for a rate increase, as it did in its last rate case, Ameren Missouri undertakes a comprehensive cost of service study. In his rebuttal testimony, Ameren Missouri's Director of Regulatory Accounting, Gary S. Weiss, described, in great detail, the extensive process Ameren Missouri uses to create a comprehensive cost of service study.⁴

4. In a general rate increase case, the comprehensive cost of service study presented by the utility is only the start of the ratemaking process. The Commission's Staff also performs its own comprehensive cost of service study. A team of approximately five or six auditors representing the Commission's Staff establishes an office at the utility's office for approximately four months. Those Staff auditors perform a very detailed audit of the utility's expenses and make adjustments to those expenses to arrive at what they believe is the utility's cost to serve its customers.⁵

5. Staff's witness in this case, auditor John P. Cassidy, described the amount of effort Staff dedicated to its comprehensive cost of service study in Ameren Missouri's last rate case:

In that rate case, 29 Staff witnesses sponsored testimony, seven of which were auditors. At least an additional 11 Staff members provided support and administrative assistance with the processing of that rate case. Staff members dedicated approximately 9,094 hours to that rate case during the five and one-half month time span between the Company's direct testimony filing on February 3, 2012, through Staff's rate design direct testimony filing on July 19,

² United for Missouri filed an *amicus curiae* brief on August 15.

³ Rate Design Complaint, Paragraph 3, admitted in Ameren Missouri's Answer.

⁴ Weiss Rebuttal, Ex. 5, Pages 5-16.

⁵ Weiss Rebuttal, Ex. 5, Page 16, Lines 11-23.

2012. In total, Staff reported approximately 16,305 hours of time in order to process the Ameren Missouri ER-2012-0166 rate case over the 11-month statutory rate case process duration, including the evidentiary hearings, submission of briefs and implementation of the Commission ordered tariffs. In addition, during that rate case Staff performed 665 adjustments to revenues, expenses, plant in service and depreciation reserve in addition to calculating an appropriate rate of return and capital structure, examining the Company's depreciation rates, analyzing its tariffs, and developing an appropriate rate design.⁶

6. In the last rate case, after considering the comprehensive cost of service studies presented by Ameren Missouri and by Staff, and after examining the evidence and arguments presented by Ameren Missouri, Staff, the Office of the Public Counsel, and the numerous intervening parties, the Commission considered all relevant factors and set just and reasonable rates designed to allow Ameren to recover its costs, while allowing it an opportunity to recover a reasonable return on its investment. No one has alleged that Ameren Missouri has charged its customers anything other than the rates the Commission authorized it to charge in that last rate case.

7. Rather than allege that Ameren Missouri is overcharging its customers, the Complainants allege that the rates the Commission established for Ameren Missouri in ER-2012-0166 are no longer just and reasonable because they have allowed the utility to earn more than was intended when those rates were set. The Complainants claim that this overearning is demonstrated by quarterly surveillance reports filed by Ameren Missouri.⁷

8. Each quarter Ameren Missouri is required to provide a surveillance report to the Commission's Staff regarding its income and expenses. The surveillance report is also provided to Public Counsel and other parties that have intervened in the utility's past rate cases. The reports are filed as highly confidential and cannot be viewed by the public.⁸

9. The surveillance reports are filed approximately two months after the end of the quarter. That means the September 30, 2013 surveillance report was the most recent report available when the Complainants filed their complaint in February 2014.⁹

10. The September 30, 2013 surveillance report shows that Ameren Missouri earned an actual return on equity of 10.32 percent for the twelve months ending September 30, 2013. Ameren Missouri's authorized return on equity, established in its last rate case, was 9.8 percent. Those numbers would indicate that Ameren Missouri earned approximately \$29.2 million more than its authorized rate of return during that period.¹⁰

11. Earlier surveillance reports also show that Ameren Missouri earned more than its authorized rate of return in those periods, as shown in this chart:

⁶ Cassidy Rebuttal, Ex. 12, Page 15, Lines 6-18.

⁷ Excess Earnings Complaint and Request for Expedited Review and Relief, Paragraph 12.

⁸ Commission Rule 4 CSR 20.090(10) requires the filing of the surveillance reports; 4 CSR 3.161(6) describes what must be contained in the surveillance reports and makes them highly confidential.

⁹ Meyer Direct, Ex. 1, Page 3, Lines 3-9.

¹⁰ Meyer Direct, Ex. 1, Page 4, Lines 1-5.

Period Reported	Actual Rate of Return
12 months ending September 30, 2013	10.32%
12 months ending June 30, 2013	10.57%
12 months ending March 30, 2013	12.28%
12 months ending December 31, 2012	11.66%
12 months ending September 30, 2012	10.50%
12 months ending June 30, 2012	10.53%

12. Although those more recent periods show strong earnings by Ameren Missouri, the same information for earlier periods show that Ameren Missouri was earning substantially less than its authorized return on equity for most months between June 2007 and November 2011, as shown in this chart:

Month	Return on Equity		Month	Return on Equity		Month	Return on Equity
June 2007	8.85%		December	7.45%		June	8.32%
July	9.07%		January 2009	7.40%		July	9.74%
August	9.74%		February	6.64%		August	10.49%
September	10.46%		March	6.55%		September	11.02%
October	9.90%		April	5.99%		October	10.84%
November	9.58%		May	6.14%		November	9.27%
December	9.82%		June	6.47%		December	8.89%
January 2008	10.07%		July	6.08%		January 2011	8.22%
February	9.70%		August	6.43%		February	8.10%
March	10.14%		September	6.72%		March	8.56%
April	11.32%		October	7.50%		April	8.44%
May	10.79%		November	7.77%		May	8.58%
June	10.46%		December	7.27%		June	8.11%
July	10.35%		January 2010	8.55%		July	8.56%
August	9.63%		February	8.96%		August	7.18%
September	8.71%		March	8.61%		September	8.21%
October	7.60%		April	7.82%		October	8.20%
November	6.67%		May	7.29%		November	8.18%

11

¹¹ The information in the table is drawn from a chart showing those historic actual rates of return on equity found in Gary Weiss' Direct Testimony in the last rate case, which was Exhibit 5 in File No. ER-2012-0166. The Commission took administrative notice of that testimony at page 267, Lines 13-15 of the transcript in this case.

13. However, it is important to understand that the earnings levels reported in the surveillance reports are actual per book earnings of the utility and cannot be compared directly to an authorized return on equity to determine whether a utility is overearning. Actual per book earnings are often computed differently than earnings used for the purpose of establishing rates. When setting rates, the Commission looks at “normal” levels of ongoing revenues and expenses, while book earnings can be affected by abnormal, non-recurring and extraordinary events. A good example of this is the weather.¹²

14. The Commission sets a utility’s rates on the assumption that weather will be normal. But, of course, we all know that Missouri weather is seldom normal. If the summer is very hot and people use their air conditioners more than average, Ameren Missouri will sell more than the usual amount of electricity and its revenues will be higher than expected. That means its actual per book earnings will be higher than anticipated when rates were set. However, the next summer temperatures may be cooler than normal, meaning air conditioners are not turned on and Ameren Missouri’s actual per book earnings will fall below expectations. As a result, a single year of data needs to be normalized to remove the effect of abnormal weather before it can be used to set rates. Weather is only one of many items that must be adjusted or normalized when setting rates.¹³

15. The Complainants do not dispute that the surveillance reports alone cannot be used to set rates for Ameren Missouri, and agree that “a further review of Ameren Missouri’s operations must be conducted to determine if the [surveillance report] results are reflective of ongoing operations.”¹⁴ In its direct case, the Complainants presented the testimony of Greg R. Meyer, who made fourteen adjustments to Ameren Missouri’s earnings as reported on the September 30, 2013 surveillance report, and concluded that for that year, Ameren Missouri had overearned by \$67,130,000.¹⁵

16. Meyer’s proposed adjustments to the September 30, 2013 surveillance report were sharply criticized in the rebuttal testimony offered by the witnesses for Ameren Missouri and Staff.¹⁶ In his surrebuttal testimony, Meyer made thirteen adjustments to the income reported by Ameren Missouri in its December 31, 2013 surveillance report (many of them different from the adjustments proposed in his direct testimony), and concluded that for that year, Ameren Missouri had overearned by \$49,442,000.¹⁷

17. At the hearing, Meyer conceded that his direct testimony was “not as accurate as it should be” and asked the Commission to instead concentrate on the adjustments and analysis presented in his surrebuttal testimony.¹⁸

18. Aside from the adjustments proposed by Meyer, the Complainants also proposed to adjust the return on equity that the Commission established for Ameren Missouri in its last rate case. In Ameren Missouri’s most recent rate case, decided in December 2012, the Commission found that Ameren Missouri should be authorized to earn a return on equity of 9.8 percent.¹⁹

¹² Oligschlaeger Rebuttal, Ex. 11, Page 13, Lines 10-19.

¹³ Cassidy Rebuttal, Ex. 12, Page 36, Lines 1-9.

¹⁴ Meyer Direct, Ex. 1, Page 4, Lines 13-14.

¹⁵ Meyer Direct, Ex. 1, Page 5, Table 1.

¹⁶ Weiss Rebuttal, Ex. 5, and Cassidy Rebuttal, Ex. 12.

¹⁷ Meyer Surrebuttal, Ex. 2, Page 4, Table 1.

¹⁸ Transcript, Pages 158-159, Lines 15-25, 1-4.

¹⁹ Oligschlaeger Rebuttal, Ex. 11, Page 11, Lines 6-7.

19. The Complainants' witness, Michael Gorman, recommended that the Commission set Ameren Missouri's authorized return on equity at 9.40 percent.²⁰ His recommended return is roughly the mid-point of a range of 8.90 percent to 9.85 percent, derived from his DCF (Discounted Cash Flow), Risk Premium, and CAPM (Capital Asset Pricing Model) model analysis.²¹ In Ameren Missouri's last rate case, Gorman recommended a return on equity of 9.3 percent, as the mid-point of a range of 9.2 to 9.4 percent.²² Ameren Missouri's currently authorized return on equity of 9.8 percent is within Gorman's range of reasonable rates of return.²³

20. Ameren Missouri's witness, Robert B. Hevert, recommended that Ameren Missouri's authorized return on equity be set at 10.4 percent, which is the mid-point of his range of 10.2 percent to 10.6 percent.²⁴

21. The average awarded return on equity for vertically integrated electric utilities in the United States for the period of January 2013 through March 2014 was 9.92 percent.²⁵

22. Staff also undertook a limited review of the income reported in Ameren Missouri's December 31, 2013 surveillance report. In his surrebuttal testimony, Staff witness John Cassidy offered eleven adjustments to Ameren Missouri's reported income and found that Ameren Missouri's adjusted book earnings for that year exceeded its authorized return by \$39,135,000.²⁶ However, Staff stressed that it did not believe that figure should be used to reset Ameren Missouri's rates.²⁷

23. Staff does not offer its "overearning" figure as the basis for resetting Ameren Missouri's rates largely because that figure is not derived from a comprehensive cost of service study. Both Staff's cursory review and the review presented by the Complainants examine only a few of what the witnesses thought were the most significant factors affecting Ameren Missouri's earnings. If Staff had been allowed enough time to conduct a comprehensive cost of service study in this case, it would also have examined:

- A fuel model to determine an appropriate level of fuel expense, purchased power, and off-system sales revenue;
- The impact of customer growth;
- Annualization of revenues from large customers;
- Annualization of revenues from Lake of the Ozarks shoreline management;
- Existing depreciation rates;
- Appropriate levels of plant in service and other rate base items;
- Cost of new electrostatic precipitators at the Labadie plant;
- Cash working capital;
- Decline in power plant maintenance expense;
- Assessment of capacity and bilateral sales and swaps;
- Appropriate levels of MISO revenues and expenses;

²⁰ Gorman Direct, Ex. 3, Page 2, Lines 5-7.

²¹ Gorman Direct, Ex. 3, Page 30, Table 2.

²² Transcript, Pages 297-298, Lines 13-25, 1-6.

²³ Transcript, Page 301, Lines 4-24.

²⁴ Hevert Rebuttal, Ex. 7, Page 61, Lines 8-13.

²⁵ Hevert Rebuttal, Ex. 7, Schedule RBH-1.

²⁶ Cassidy Surrebuttal, Ex. 13, Pages 6-7, Lines 14-23, 1-4.

²⁷ Cassidy Surrebuttal, Ex. 13, Page 7, Lines 12-13.

- Payroll levels affected by changes in employment levels and overtime;
- Changes in amortizations currently in place;
- Pension costs;
- Rate case expense;
- Advertising;
- Dues and Donations;
- Lobbying expense;
- Insurance expense;
- Rents and leases expense;
- Changes in property taxes;
- Net write-offs;
- Various trackers;
- Environmental costs;
- Legal costs;
- The PSC assessment;
- Corporate franchise taxes;
- Low-income weatherization programs;
- Keeping Current program costs; and
- Income taxes.²⁸

Any estimation of the company's revenue requirement that is not based on a comprehensive cost of service study will necessarily carry a much lower degree of certainty with regard to its accuracy.²⁹ Determining an appropriate cost of service is an extremely complex and interactive exercise. Until the work is done, no one knows what the answer will be.³⁰

24. Even if the overearnings figure presented by the Complainant's limited study was accepted as an accurate description of what Ameren Missouri earned in 2013, the figure still would not be a reasonable basis for establishing going-forward rates for the company. The Complainant's analysis ends with its adjustments to the December 31, 2013 surveillance report, other than a mention of the raw, unanalyzed March 31, 2014 surveillance report.³¹ Ameren Missouri expects to place in service over \$1 billion in capital projects before the end of 2014, which it will seek to recover in future rates.³² In addition, Ameren Missouri's payment of solar rebates in 2014 will likely increase the company's revenue requirement by approximately \$33.7 million.³³

25. The Complainants' witness acknowledged that at some point Ameren Missouri's large investments of capital would likely mean that the company was no longer in an overearning position.³⁴

²⁸ Transcript, Pages 368-376.

²⁹ Transcript, Page 386, Lines 16-23.

³⁰ Transcript, Page 326, Lines 2-18.

³¹ Transcript, Page 201, Lines 7-9.

³² Barnes Rebuttal, Ex. 6, Page 5, Lines 1-11.

³³ Weiss Rebuttal, Ex. 5, Pages 26-27, Lines 22-23, 1-4.

³⁴ Meyer Surrebuttal, Ex. 2, Page 19, Lines 1-6.

26. It is important to understand that the analysis that Meyer presented in his direct testimony and substantially revised in his surrebuttal testimony is, by his own admission, not a comprehensive cost of service study of the type normally done in a general rate case.³⁵

Furthermore, Meyer agreed that a comprehensive cost of service study should be required when a utility is seeking to raise its rates.³⁶ Thus, the Complainants are explicitly asking the Commission to apply a lower evidentiary standard when considering a complaint to lower a utility's rates.³⁷

27. Ameren Missouri has filed its own rate case seeking a rate increase. That request is pending in File No. ER-2014-0258, and must be resolved no later than May 2015.

Conclusions of Law

A. Union Electric Company, d/b/a Ameren Missouri is an electrical corporation as that term is defined at Section 386.020(15), RSMo (Supp. 2013). As an electrical corporation, Ameren Missouri is subject to regulation by this Commission as described in Chapters 386 and 393, RSMo.

B. Section 386.390.1, RSMo 2000 establishes the standards for bringing complaints before this Commission. The relevant part of section states:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation of any provision of law, or of any rule or order or decision of the commission;

The section goes on to state:

Provided that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or president or chairman of the board of alderman or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

³⁵ Transcript, Pages 191-192, Lines 23-25, 1-7.

³⁶ Transcript, Page 199, Lines 3-5.

³⁷ Meyer Surrebuttal, Ex. 2, Page 19, Lines 18-22; Transcript, Page 244, Lines 8-25; and Initial Post-Hearing Brief of Complainants, Page 15.

Similarly, Section 393.260, RSMo 2000, permits the filing of complaints as to the quality and price of electricity to be brought by not less than twenty-five consumers or purchasers of that electricity.

This complaint alleges the rate Ameren Missouri charges to Noranda for electricity is unreasonable, and, as required by the second part of the statutory section, the complaint is signed by not less than twenty-five customers. Therefore, the complaint complies with the statutory requirements.

D. This action is a complaint against Ameren Missouri. So, the Complainants, as the party asserting the affirmative of an issue, bear the burden of proving the allegations made in their complaint.³⁸

E. Commission rule 4 CSR 240-20.090(10) requires each electric utility with a fuel adjustment clause (a rate adjustment mechanism or RAM within the words of the regulation) to submit a quarterly Surveillance Monitoring Report. The required contents of the quarterly report are described by Commission rule 4 CSR 240-3.161(6). That regulation also requires that such reports be treated as highly confidential.

F. Since the Commission is a creature of statute, its powers are limited to those conferred by statute, either expressly, or by clear implication. “Neither convenience, expediency or necessity are proper matters for consideration in the determination of’ whether or not an act of the commission is authorized by the statute.”³⁹

G. Section 393.270, RSMo 2000, establishes the procedures and standards by which the Commission is to establish the price a utility may charge to provide electricity to its customers.

H. Subsection 393.270.1, RSMo 2000, gives the Commission authority to investigate “any matter of which complaint may be made as provided in sections 393.110 to 393.285, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it.” That would include complaints about the price of electricity authorized by Section 393.260, RSMo 2000.

I. Subsection 393.270.2, RSMo 2000, gives the Commission authority to establish the price of electricity, stating:

After hearing and after such investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of ... electricity ... to be charged by such corporation or person, for the service to be furnished ... as will in its judgment be adequate, just and reasonable.

³⁸ *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm’n*, 116 S.W.3d 680 (Mo. App. W.D. 2003). See also, *AG Processing, Inc. v. KCP&L Greater Missouri Operations Company*, 385 S.W.3d 511 (Mo. App. W.D. 2012).

³⁹ *State ex rel. Util. Consumers Council v. Pub. Serv. Comm’n*, 585 S.W. 2d 41, 49 (Mo banc 1979), quoting, *State ex rel. Kansas City v. Pub. Serv. Comm’n*, 257 S.W. 462 (Mo. Banc 1923).

J. Subsection 393.270.4, RSMo 2000, describes the facts the Commission can examine when setting the price of electricity:

In determining the price to be charged for ... electricity ... the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

K. In a 1957 decision regarding the appeal of a Missouri Water Company rate case, the Missouri Supreme Court interpreted Section 393.270 RSMo. The Supreme Court concluded that the statutory phrase “among other things” clearly denotes that ‘proper determination’ of such charges is to be based upon *all* relevant factors.”⁴⁰

L. Failing to consider all relevant factors when adjusting a utility’s rates is condemned as single-issue rate making and is generally prohibited in Missouri.⁴¹

M. In the Missouri Water Company case, the Commission had applied an original cost less depreciation standard to determine the amount of the utility’s rate base, and refused to consider the company’s evidence that post-World War II inflation had affected the value of that rate base. In clinging to an original cost valuation of rate base, the Commission stated that it was “motivated primarily by practical considerations”, concluding that any attempt to inflate the company’s rate base would be difficult and uncertain.⁴² In rejecting that argument, the Supreme Court said:

But however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse or expediency can be substituted for the requirement that such rates be ‘authorized by law’ and ‘supported by competent and substantial evidence upon the whole record.’⁴³

N. Rate making is designed to be forward looking. The goal is to choose a representative test year to estimate what costs will be when rates are in effect, not to make adjustments for past earning levels.⁴⁴ The practice of setting future rates to adjust for past earning levels is condemned as retroactive ratemaking that would deprive either the utility or its customers of their property without due process.⁴⁵

⁴⁰ *State ex rel Missouri Water Co. v. Pub. Serv. Comm’n*, 308 S.W.2d 704, 719 (Mo. 1957) (emphasis in original).

⁴¹ *State ex rel. Pub. Counsel v. Pub. Serv. Comm’n*, 397 S.W.3d 441, 448 (Mo. App. W.D. 2013).

⁴² *Missouri Water Co.* at 713.

⁴³ *Missouri Water Co.* at 720. Citing Article V, §22 (now §18), Constitution of Missouri. (That is the section establishing standards for judicial review of administrative decisions).

⁴⁴ *State ex rel. Southwestern Bell Tele. Co. v. Pub. Serv. Comm’n*, 645 S.W.2d 44, 48 (Mo. App. W.D. 1982).

⁴⁵ *State ex rel. Util. Consumers Council of Mo, Inc. v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 58 (Mo. banc 1979).

O. The Commission only sets the rates that Ameren Missouri, or any other utility, may charge its customers. It does not determine a maximum or minimum return the utility may earn from those rates. Sometimes, the established rate will allow the utility to earn more than was anticipated when the rate was established. Sometimes, the utility will earn less than anticipated. But the rate remains in effect until it is changed by the Commission and so long as the utility has charged the authorized rate, it cannot be made to refund any “overearnings”, nor can it be allowed to collect any “underearnings” from its customers.⁴⁶

Decision

No Allegation of Misconduct

The Complainants have brought this overearnings complaint before the Commission in an attempt to show that Ameren Missouri’s electric rates should be reduced because that company is earning a return on equity greater than contemplated when its rates were set in its most recent rate case. In evaluating the complaint, the first thing that must be understood is that no one has shown, and indeed, no one has alleged, that Ameren Missouri has done anything wrong. Ameren Missouri has simply charged its customers the electric rates the Commission authorized it to charge in its last rate case. Although the parties, and this order, speak of overearnings, doing so is just a shorthand way of describing a situation where the utility is earning more from its rates than was anticipated when those rates were established. If a company is overearning, or underearning, the Commission may need to adjust future rates to correct the imbalance. But the Commission cannot order Ameren Missouri to “pay the money back” by refunding past overearnings, nor can it allow the utility to collect past underearnings from its customers.

The Complainants’ Burden of Proof

To meet their burden of proving their complaint, the Complainants point first to the surveillance reports filed by Ameren Missouri that show the utility has been earning a rate of return on equity greater than the return contemplated when rates were set. But those raw, unadjusted, surveillance reports alone do not provide a complete or accurate picture of Ameren Missouri’s earnings sufficient to reset the utility’s rates.

Missouri law requires the Commission to examine all relevant factors when setting rates. When a utility files tariffs seeking to increase its rates, the Commission requires the utility to file a comprehensive cost of service study as part of its direct testimony. That study must examine all relevant factors that could affect the amount the utility will be allowed to recover in its rates. The Commission’s Staff then audits the company to verify the numbers and prepares its own cost of service study. Public Counsel and intervening parties may also review the utility’s costs and offer testimony about any relevant factors that they choose to address. In such a case, the Commission usually requires eleven months, which is the maximum amount of time allowed by statute, to complete the review, hold a hearing, issue a decision, and approve new rate tariffs filed by the utility.

⁴⁶ *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666 (Mo. 1950).

In contrast to the typical file and suspend rate case process followed when a utility seeks to raise rates, the Complainants merely took the September 2013 surveillance report data, looked at what they believed to be the most significant factors, and proposed fourteen adjustments. Then in the Complainant's surrebuttal testimony, their witness abandoned the test year and adjustments proposed in his direct testimony and proposed thirteen, mostly different adjustments to the December 2013 surveillance data.⁴⁷ The exhaustive cost of service study usually performed by Staff in a general rate case, while desirable, is not established as the legal standard for adjusting a utility's rates. Rather, the law requires the Commission to consider all *relevant* factors; not all *possible* factors.⁴⁸ A complainant could adequately support a rate adjustment with a cost of service study less extensive than the audit undertaken by Staff if that adjustment can be shown to take into account all relevant factors. But the cost of service study offered by the Complainants in this case did not meet that standard.

Importantly, the cost of service study presented by the Complainants essentially stops at the end of 2013 and does not take into account the additional costs Ameren Missouri has already incurred in 2014 for ongoing capital projects and payment of solar rebates. Rate making is supposed to be forward-looking, with a goal of setting rates that will allow the utility to recover its costs and earn a reasonable return on its investment while those rates are in effect. That system assumes a utility's revenues, expenses and profits will fluctuate from month to month, and year to year, but will even out over time. Complainants concede that at some point Ameren Missouri's large investment of capital will likely end what they believe is an overearnings position. Limiting a cost of service study to certain past earnings figures in the hope of capturing a momentary overearning, while overlooking a more significant period for an earnings trend is not appropriate regulatory policy.

Ameren Missouri's current forward-looking rates went into effect at the start of 2013. The Complainants want to reset those rates based on earnings information that ends with the end of 2013. The Commission concludes that adjusting rates in this case without taking into account known ongoing and future costs would be contrary to sound ratemaking principles.

The Commission must consider all relevant factors when setting rates. The Complainants have not met their burden to prove that Ameren Missouri's current rates are no longer just and reasonable. Therefore, the Commission will deny and dismiss the complaint.

⁴⁷ One of the adjustments proposed by the Complainants was to lower Ameren Missouri's authorized return on equity from 9.8 percent to 9.4 percent. The evidence presented did not demonstrate that Ameren Missouri's cost of capital, including its reasonable return on equity, has significantly changed since the Commission examined that cost in Ameren Missouri's last rate case. Indeed, the Complainants' expert witness recommended return on equity in this case is higher than the return he recommended in the last rate case. As a result, the Complainants are seeking an opportunity to re-litigate the Commission's return on equity decision from the last case. The Commission will reevaluate an appropriate return on equity for Ameren Missouri in the on-going general rate case, but there is no reason to do so here.

⁴⁸ Only one ratemaking standard is established by Missouri's statutes as interpreted by Missouri's courts. That standard is the same whether the Commission is deciding to increase or decrease rates.

THE COMMISSION ORDERS THAT:

1. The complaint brought by Noranda Aluminum, Inc. and the other complainants is denied and dismissed.
2. This report and order shall become effective on October 31, 2014.

R. Kenney, Chm., Stoll, W. Kenney, and
Hall, and Rupp, CC., concur; and certify
compliance with the provisions of
Section 536.080, RSMo

Dated at Jefferson City, Missouri, on
this 1st day of October, 2014.

In the Matter of the Application of)
Peaceful Valley Service Company's Request) **File No. SR-2014-0153**
For Increase in Sewer Operating Revenues) Tracking No. YS-2014-0425

In the Matter of the Application of)
Peaceful Valley Service Company's Request) **File No. WR-2014-0154**
For Increase in Water Operating Revenues) Tracking No. YW-2014-0426

RATES. §20. Costs and expenses. §68. Establishment of rate base. The Commission approved a settlement that provided no funding to bring a sewer system into compliance with environmental regulations because the nature of the improvements, amount of funding needed, and the continued for-profit nature of the applicant, were not established on the record.

REPORT AND ORDER

Issue Date: October 8, 2014

Effective Date: October 18, 2014

APPEARANCES

PSC Staff

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Office of the Public Counsel

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REGULATORY LAW JUDGE: Kim S. Burton

Procedural History

On November 20, 2014, Peaceful Valley Service Company ("Peaceful Valley" or "Company") initiated a small water and sewer company rate increase action, pursuant to Commission Rule 4 CSR 240-3.050. Peaceful Valley requested an increase of approximately 139% (\$93,840) in its annual sewer system operating revenues in order to upgrade its treatment facilities. No increase in water system operating revenues was requested.

Staff of the Public Service Commission and Company filed a disposition agreement with the Commission on April 21, 2014. On April 24th¹ Peaceful Valley filed tariffs consistent with the terms of the disposition agreement. In order to allow forty-five days' notice, the effective date of the tariffs was June 15th. The Office of the Public Counsel requested the Commission suspend the tariffs and hold a local public hearing. The Commission suspended the tariffs until August 22nd and set a local public hearing for June 15th in Owensville, Missouri.

At the local public hearing, customers testified in opposition to Staff and Company's disposition agreement, complaining that the disposition agreement's sewer rate increase needed to be much higher in order to cover the cost of the improvements required by the Missouri Department of Natural Resources ("DNR"). Those testifying at the hearing expressed frustration that while one state agency was mandating system improvements, another state agency was not authorizing the funding for those improvements. On the 10th of July, Staff filed a notice of a corrected and updated disposition agreement ("Disposition Agreement") between Staff and Company for both the water and sewer systems, which updated the Disposition Agreement to reflect the new assessment amounts and made other minor corrections. The Disposition Agreement provides for an increase of 9.6% (\$2,335) in operating revenues for the sewer system. It also provides for a decrease of 2.55% (\$965) in operating revenues for the water system.

The Office of the Public Counsel filed a position statement indicating that while it did not agree with the Disposition Agreement, it would not oppose its approval by the Commission. The Commission directed Staff to submit a report concerning Peaceful Valley's plans to comply with DNR's ammonia limits and further suspended the tariffs until October 13th.

An evidentiary hearing was held on September 23rd. No post-hearing briefs were submitted.

¹ All calendar references are to 2014 unless otherwise noted.

Findings of Fact

1. Peaceful Valley Lake is located in a rugged, picturesque area in Gasconade County.² Peaceful Valley is a for-profit public utility that provides water and sewer service to residents who live around Peaceful Valley Lake.³ Peaceful Valley was issued Certificates of Convenience and Necessity by the Commission on April 18, 1975, to operate a water and sewer system.⁴ The Company currently provides water service to approximately 181 customers and sewer service to approximately 171 customers.⁵

2. Peaceful Valley's water system consists of: a well with no treatment; a master meter at the wellhead; a ground storage tank; and a distribution system.⁶ There are no customer meters.⁷ Residential and small commercial customers currently pay a flat rate of \$29.24 per quarter. In addition, 340 customers located next to a water main who do not receive water service pay a water availability fee of \$8.16 per quarter.⁸ The water system is in good physical condition and operating properly.⁹

3. For its sewer system, Peaceful Valley uses a single-cell lagoon.¹⁰ Customers pay a flat fee of \$33.53 per quarter.¹¹ The facility operates properly and discharges treated waste water into a nearby receiving stream which is a tributary of Cedar Branch, a waterway of the State of Missouri.¹² This discharge by Peaceful Valley is authorized by a Missouri State Operating Permit ("Operating Permit") issued by DNR.¹³ Company's Operating Permit must be periodically renewed by DNR.¹⁴

4. Peaceful Valley's Operating Permit was renewed by DNR on January 1, 2014 and expires on December 31, 2018.¹⁵ The Operating Permit contains a schedule for compliance¹⁶ with DNR's current limits on the amount of ammonia¹⁷ discharged by Peaceful Valley's treatment facility. Pursuant to Peaceful Valley's Operating Permit, it will not have to meet the state effluent limits for ammonia until January 1, 2018.

² Attachment C to Ex. 13.

³ Id. Tr. pg. 138, ln 14-25. Peaceful Valley is owned by a property owners association in which all customers of Peaceful Valley are members.

⁴ Ex. 12, pg. 84.

⁵ Id. and Ex. 13, pg. 1.

⁶ Ex. 12, pg. 84.

⁷ Ex. 12, pg. 85.

⁸ Ex. 12, pg. 85.

⁹ Ex. 12, pg. 87.

¹⁰ Ex. 12, pg. 85.

¹¹ Ex. 12, pg. 77.

¹² Ex. 2.

¹³ Ex. 13, pg. 1.

¹⁴ Id.

¹⁵ Attachment A to Ex. 13.

¹⁶ Ex. 13, pg. 9.

¹⁷ Ex. 7, Ammonia is toxic to early stages of aquatic life.

5. The Operating Permit requires monitoring of ammonia through December 31, 2017.¹⁸ But by January 1, 2018, the Operating Permit requires specified effluent limitations on ammonia.¹⁹ While Peaceful Valley is not currently in violation regarding ammonia discharge, it will not be able to meet the standards set forth in the permit by January 1, 2018, absent a change in operation or additional construction.²⁰

6. On August 22, 2013, the U.S. Environmental Protection Agency (“EPA”) finalized new, more restrictive, fresh water quality criteria for ammonia based on toxicity studies of mussels.²¹ Missouri’s current ammonia criteria, while based on toxicity testing of several species, do not include data for mussels or gill breathing snails.²² When new water quality criteria are established by the EPA, states must adopt them into their regulations in order to keep their authorization to issue permits under the National Pollutant Discharge Elimination System.²³ DNR has yet to adopt the more stringent EPA ammonia standards and it may be years before the new ammonia criteria are incorporated into DNR’s regulations.²⁴

7. In 2013, Peaceful Valley employed Integrity Engineering, Inc. (“Integrity”), a consulting engineer firm, to perform an engineering evaluation and plan for upgrading Peaceful Valley’s waste water treatment facility.²⁵ Integrity’s engineering report discussed five available options and the costs associated with each. The option deemed the most feasible by Integrity is a recirculating biofilter system.²⁶ Integrity’s recommendation of a recirculating biofilter system has an estimated capital cost of \$1,114,880.00, with a twenty year life cycle.²⁷ This option would require a monthly cost of \$46.12 per month, per customer.²⁸

8. When DNR renewed Peaceful Valley’s Operating Permit, it recommended the Company construct a treatment system that could attain effluent quality that supports not only DNR’s current guidelines, but also the EPA ammonia criteria.²⁹ The engineering report prepared by Integrity evaluated options that could meet the more stringent EPA ammonia limits.³⁰

¹⁸ Attachment A to Ex. 13, DNR Operating Permit, pg. 5 of Fact Sheet.

¹⁹ Id.

²⁰ Tr. pg. 116; ln. 24 – pg. 117; ln. 20.

²¹ Ex. 13, pg. 22.

²² Id.

²³ Ex. 13, pg. 22.

²⁴ Tr., pg. 113, ln. 3-7. It took almost six years for DNR to adopt the current ammonia standards. Tr., pg. 112, ln. 16-22).

²⁵ Attachment C to Ex. 13.

²⁶ Id. The options evaluated by Integrity include upgrading the current lagoon, land application of treated waste water, and mechanical treatment plants. These other options were not deemed viable due to issues with geography, land acquisition costs, operation and maintenance expense, or potential odor issues.

²⁷ Attachment C to Ex. 13.

²⁸ Ex. 13, pg. 5-6.

²⁹ Ex. 13, pg. 22.

³⁰ Tr., pg. 121, ln. 2 – pg. 122, ln. 8

9. On November 20, 2013, Peaceful Valley sent a letter to the Commission seeking a sewer rate increase of \$93,840.00 per year in order to finance the recommended improvements to the sewer system.³¹ Peaceful Valley has not finalized a plan for improvements to its sewer system.³² It is undisputed that the Disposition Agreement does not include sufficient funds to cover future improvements or changes in operation to meet ammonia limits.³³

10. The Company informed the Commission that it reluctantly signed the Disposition Agreement filed with the Commission but chose to sign it rather than consume more legal fees by going to hearing to push the issues related to complying with the DNR Operating Permit.³⁴

11. Under the terms of the water service Disposition Agreement, Staff and Peaceful Valley agreed to a revenue requirement decrease of \$965 from the previous revenue level, for an annual revenue of \$36,822.³⁵ For the sewer service Disposition Agreement, Staff and Peaceful Valley agree to a revenue requirement increase of \$2,335 to the previous revenue level, for an annual revenue of \$26,740.³⁶

12. Attempts by Peaceful Valley to obtain a bank loan to finance improvements to the sewer system were unsuccessful due to a lack of an income stream or collateral.³⁷ Peaceful Valley attempted to obtain a low interest loan from DNR and the U.S. Department of Agriculture, but was informed it did not qualify since both agencies only offer loans to non-profit entities.³⁸ Peaceful Valley is currently considering a change to nonprofit status in order to obtain a low interest loan from the Department of Agriculture.³⁹

³¹ Tr. pg. 9, ln. 10-16.

³² Tr., pg. 17. Ln. 15- pg. 18, ln. 5.

³³ Tr. pg. 9, ln. 17-23.

³⁴ Ex. 12, pg. 4 – July 7, 2014 letter from Peaceful Valley to Commission.

³⁵ Appendix A to this Report and Order, filed on July 10, 2014.

³⁶ Appendix B to this Report and Order, filed on July 10, 2014.

³⁷ Tr. pg. 14, ln. 12 – pg. 15, ln. 5.

³⁸ Ex. 13, pg. 5.

³⁹ Tr. pg. 8, ln. 18- pg. 9, ln. 2.; Ex. 12, pg. 4 – July 7, 2014 letter from Peaceful Valley to Commission.

Conclusions of Law

Peaceful Valley is a public utility subject to the Commission's jurisdiction and supervision under Chapters 386 and 393 of the Missouri Revised Statutes.⁴⁰ The Commission is tasked with setting just and reasonable rates, which may result in a revenue increase that is more or less than the increase originally sought by a utility.⁴¹

Peaceful Valley initially sought Commission approval for an increase in sewer rates to fund the DNR mandated waste water treatment improvements. The Disposition Agreement between Staff and the Company, which is currently before the Commission for approval, does not provide for recovery of those expenditures. The Commission must therefore determine if it will approve, reject or alter the Disposition Agreement.⁴²

The Commission's authority is limited to that which is specifically granted by statute or warranted by clear implication as necessary to effectively render a specifically granted power.⁴³ Sections 393.130 and 393.140, RSMo 2000, mandate that the Commission ensure all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable.

Although the Disposition Agreement does not provide a recovery mechanism for future improvements to Peaceful Valley's sewer system, the Commission is not prohibited from considering alternative funding and accounting mechanisms, such as a surcharge, to fund the required improvements. Unlike the statutory prohibition against an electrical corporation charging for construction costs on property before it is fully operational and used for service, no such statutory restriction applies to water or sewer systems.⁴⁴ Section 386.040 vests the Commission with all powers necessary and proper to carry out fully and effectually its statutory duties. Accordingly, all parties agree that the Commission has the legal authority to implement a surcharge to cover construction costs prior to the additional plant being used and useful.

As part of its duties, the Commission must also consider the "public interest" when it makes its determination.⁴⁵ The public interest is a matter of policy to be determined by the Commission.⁴⁶ It is in the public interest for public utilities to comply with water quality standards established by DNR, even if it requires improvements to an operational system. It is also in the best interest of Peaceful Valley and its ratepayers to have an identifiable source of funding for those improvements.

⁴⁰ All statutory references are to the 2013 Cumulative Supplement of the Missouri Revised Statutes, unless indicated otherwise. Section 386.020(43),(49),(59) and Section 386.250, RSMo 2000.

⁴¹ §393.150 and 4 CSR 240-3.050(25)

⁴² 4 CSR 240.3.050(25).

⁴³ *State ex re. Int'l Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.680, 686 (Mo.App. W.D. 1991).

⁴⁴ § 393.135, RSMo 2000.

⁴⁵ *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo.App. 1974).

⁴⁶ *State ex rel. Public Water Supply District v. Public Service Com'n of Missouri* 600 S.W.2d 147, 154 (Mo.App.1980).

The Commission can consider adjustments, such as a surcharge, for events that are known and measurable, certain to occur, and the impact of which can be calculated with a high degree of accuracy. Peaceful Valley's current system does not comply with DNR's current ammonia limits, nor will it meet the more stringent 2013 EPA guidelines that are expected to be adopted. Based on the unique facts presented, it is known that the Company must make improvements to its system in order to comply with stringent water quality standards. However, at this time, Peaceful Valley is uncertain as to its future corporate status or the method by which it will improve the sewer system. While a Commission-approved surcharge may provide the reliable source of income needed for Peaceful Valley to obtain a bank loan, the level of funding that would be needed and the actual system improvements cannot be calculated with any degree of accuracy at this time. Absent a clearly presented plan to implement the system improvement, the Commission finds it just and reasonable to not include sewer system improvement costs in customer rates.

Integrity provided various options to the Company on the more stringent 2013 EPA guidelines, rather than the current DNR standards. No evidence was presented as to whether a less expensive option exists that may permit system upgrades in phases, so the Company could comply with the current DNR standards before the 2018 deadline and then incorporate additional improvements when the 2013 EPA guidelines are adopted. While it may be in the public interest to ensure funding for improvements mandated by a regulating agency, in this specific instance, insufficient evidence was presented as to Peaceful Valley's plan for compliance. An obvious cause for Peaceful Valley's lack of a definitive plan is insufficient funds to either initiate Integrity's recommendation or conduct another engineering report.

While not routinely implemented or approved by the Commission in the past, the Commission will consider alternative funding mechanisms, such as a surcharge, in very limited and unique circumstances.⁴⁷ The situation in which Peaceful Valley currently finds itself – ordered by a regulating agency to improve its system and an inability to finance the improvements under its current rate schedule – could present such a unique circumstance that consideration of alternative funding mechanisms is warranted.

Section 393.847.3 removes the Commission's jurisdiction over the "construction, maintenance or operation of the wastewater facilities, service, rates, financing, accounting or management of any nonprofit sewer company." Should Peaceful Valley follow through with its plan to become a nonprofit sewer company, it will no longer be subject to the Commission's jurisdiction and will be entitled to set whatever rates it deems sufficient.⁴⁸

⁴⁷ See File No. WR-2009-0418, *In the Matter of the Application of Gladlo Water & Sewer Company, Inc., for an Increase in Annual Sewer and Water Operating Revenues*, EFIS Document No. 16 – *Order Approving Small Company Rate Increase and Approving Tariff*, issued on November 23, 2009. File No. WR-2013-0259; *In the Matter of a Request for Increases in Annual Sewer and Water System Operating Revenues*, EFIS document No. 21 *Order Approving Unanimous Stipulation and Agreement and Tariff*, issued on July 31, 2013.

⁴⁸ This decision is certainly within Peaceful Valley's right as a company to decide.

The Commission has reviewed the Disposition Agreement for the water and sewer services, Staff's recommendation, the Office of Public Counsel's comments and the testimony and evidence offered at hearing. Based on the facts presented, the Commission finds the rates and terms agreed upon by Staff and the Company to be just and reasonable. The Commission has authority to approve tariff sheets under sections 393.140(11) and 393.150, RSMo 2000. The Commission finds the tariff sheets submitted by Peaceful Valley conform to the terms of the Disposition Agreement as intended by the parties, and should be approved to become effective on October 18th.

Although the Commission will not approve funding for the sewer system improvements at this time, should Peaceful Valley wish to remain a Commission regulated utility and desire a source of income for planned sewer system improvements – such as a surcharge – the Commission may consider the request, if a definitive improvement plan and funding structure are presented.

THE COMMISSION ORDERS THAT:

1. The terms of the Updated Company/Staff Disposition Agreement in File No. WR-2014-0154 are approved.
2. The terms of the Updated Company/Staff Disposition Agreement in File No. SR-2014-0153 are approved.
3. The signatories shall comply with the terms of the Company/Staff Disposition Agreement submitted in File No. WR-2014-0154 on July 10, 2014. A copy of the Water Disposition Agreement is attached to this order as Appendix A.
4. The signatories shall comply with the terms of the Company/Staff Disposition Agreement submitted in File No. SR-2014-0153 on July 10, 2014. A copy of the Sewer Disposition Agreement is attached to this order as Appendix B.
5. No later than April 13, 2015, Peaceful Valley shall inform the Commission of the status of any change in its for-profit corporate structure.
6. Should Peaceful Valley desire Commission-approval of a surcharge to finance improvements to its sewer system, it shall submit a letter to the Commission no later than April 13, 2015, which also details the proposed improvements and the cost and timeframe for the improvements.
7. The following revised sewer service tariff sheets filed by Peaceful Valley Service Company on April 24, 2014, and assigned Tariff File No. YS-2014-0425, are further suspended until October 18, 2014, and approved to become effective on October 18, 2014:

P.S.C. MO No. 4

Canceling P.S.C. MO No. 3

8. The following revised water service tariff sheets filed by Peaceful Valley Service Company on April 24, 2014, and assigned Tariff File No. YW-2014-0426, are further suspended until October 18, 2014, and approved to become effective on October 18, 2014:

P.S.C. MO No. 3

Canceling P.S.C. MO No. 2

9. Peaceful Valley shall file the information required by Section 393.275, RSMo, 2000 and Commission Rule 4 CSR 240-10.060 no later than November 3, 2014.

10. All objections not ruled on are overruled and all pending motions not otherwise disposed of are hereby denied.

11. This Report and Order shall become effective on October 18, 2014.

R. Kenney, Chm., concurs with separate concurring opinion to follow, Stoll, W.
Kenney, Hall, and Rupp, CC., concur;
and certify compliance with the
Provisions of Section 536.080, RSMo

Burton, Regulatory Law Judge

NOTE: At the time of publication, no opinion of Commissioner Kenny has been filed.

In the Matter of the Joint Application of Brandco)
Investments, LLC and Hillcrest Utility Operating)
Company, Inc., for Hillcrest to Acquire Certain) **File No. WO-2014-0340 et al.**
Water and Sewer Assets of Brandco and, Inc.)
Connection Therewith, Issue Indebtedness and)
Encumber Assets)

CERTIFICATES. §28. Contracts. §53. Consolidation or merger.

PUBLIC UTILITIES. §13. Acquisition of public utility property. The Commission granted an application for one company to acquire the assets and assume the services of another, conditioned the execution of contracts for operation, billing, and emergency answering arrangements.

ORDER APPROVING STIPULATION AND AGREEMENT AND GRANTING A CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: October 22, 2014

Effective Date: November 1, 2014

On May 13, 2014, Brandco Investments, LLC and Hillcrest Utility Operating Company, Inc., filed an application asking the Commission to approve Hillcrest's acquisition of the water and sewer assets of Brandco, and to grant Hillcrest a certificate to operate those assets as a public utility. On August 26, the Commission's Staff recommended the Commission approve the transfer and grant the certificate, subject, however, to certain financial conditions that Hillcrest found unacceptable.

To resolve the disagreement, the Commission established a procedural schedule that would have led to an evidentiary hearing on October 29. However, on October 10, Hillcrest and Staff filed a nonunanimous stipulation and agreement in which they agree that Hillcrest should be authorized to acquire and operate the water and sewer assets of Brandco, subject to certain agreed-upon conditions.

The Office of the Public Counsel is also a party to this case and did not sign the stipulation and agreement. However, the stipulation and agreement represents that Public Counsel does not oppose the agreement. Furthermore, Public Counsel has not acted to oppose the stipulation and agreement within seven days of its filing. Pursuant to Commission Rule 4 CSR 240-2.115(2), the Commission will treat the stipulation and agreement as unanimous.

In summary, the stipulation and agreement provides that Hillcrest should be authorized to acquire and operate the water and sewer systems currently owned and operated by Brandco in Cape Girardeau County, Missouri. It provides that Hillcrest should be authorized to finance its purchase of the Brandco systems by entering into a loan agreement with Fresh Start Ventures LLC. It also requires Hillcrest and affiliated companies to make their books and records available for review by Staff and Public Counsel; it requires Hillcrest to provide additional information concerning the financing of the transaction to Staff and Public Counsel; establishes depreciation rates for use by Hillcrest; and imposes other requirements on Hillcrest.

After reviewing the stipulation and agreement, the Commission independently finds and concludes that such stipulation and agreement is in the public interest and should be approved. Since this stipulation and agreement is not opposed by any party and because some of the provisions of the stipulation and agreement are time-sensitive, the Commission will make this order effective in ten days.

THE COMMISSION ORDERS THAT:

1. The Stipulation and Agreement filed on October 10, 2014, is approved as a resolution of the issues addressed in that stipulation and agreement. The signatory parties are ordered to comply with the terms of the stipulation and agreement. A copy of the stipulation and agreement is attached to this order, and is incorporated herein by reference.
2. Brandco Investments LLC is authorized sell, and Hillcrest Utility Operating Company, Inc. is authorize to acquire, the water and sewer utility systems formerly owned and operated by Brandco, subject to the conditions described in the stipulation and agreement.
3. Hillcrest Utility Operating Company, Inc. is authorized to enter into, execute, and perform in accordance with the terms described in the Agreement for Sale of Water and Sewer Systems attached to the Joint Application, and to take any and all other actions that may be reasonably necessary and incidental to the performance of the acquisition.
4. Hillcrest Utility Operating Company, Inc. is authorized to enter into, execute, and deliver loan agreements with Fresh Start Ventures LLC to incur indebtedness.
5. Hillcrest Utility Operating Company, Inc. is authorized to create and make effective a first lien on all the franchises, certificates of convenience and necessity, plant and systems of Hillcrest, to secure its obligations under the loan.
6. Hillcrest Utility Operating Company, Inc. is authorized to enter into, execute, deliver, and perform the necessary promissory notes, loan agreements, and other documents necessary to effectuate the financing transactions.
7. Hillcrest Utility Operating Company, Inc. shall not close on assets, or operate as a water and/or sewer utility unless it has operation, billing, and emergency answering arrangements (contracts) that can be in place and exercised immediately upon closing.
8. Hillcrest Utility Operating Company, Inc. shall notify the Commission of closing on the assets within five days after such closing.
9. Brandco Investments LLC is authorized to cease providing water and sewer service immediately after closing of the assets. By separate order to be issued after notification of closing, the Commission will cancel Brandco's certificate of convenience and necessity.
10. Hillcrest Utility Operating Company, Inc. is granted a certificate of convenience and necessity to be effective upon closing of the assets.
11. In approving the stipulation and agreement and in granting Hillcrest Utility Operating Company, Inc. a certificate of convenience and necessity, the Commission is making no findings regarding the ratemaking treatment to be afforded any matters pertaining to the granting of the certificate or expenditures related to the certificated service area.
12. This order shall become effective on November 1, 2014.

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur.

Woodruff, Chief Regulatory Law Judge

NOTE: The Stipulation And Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of)
Summit Natural Gas of Missouri Inc.'s)
Filing of Revised Tariffs to Increase Its)
Annual Revenues for Natural Gas Service)

File No. GR-2014-0086
Tracking No. YG-2014-0285

EXPENSES

§6. Accounting

GAS

§23. Valuation

§24. Accounting

The Commission ordered the filing of tariffs that assign excess capacity to an account for which amounts do not count in rate base, and thus in rates, until used.

RATES

§47. Value of cost of the property. The Commission ordered the filing of tariffs that record the value of purchased assets at net original cost.

§73. Period for which effective. The Commission denied a request that new rates be phased in because no party supporting that request showed how a phase-in would provide relief, considering that a carrying cost would be necessary.

REPORT AND ORDER

Issue Date: October 29, 2014

Effective Date: November 28, 2014

The Commission is rejecting the pending tariff sheets ("tariffs")¹ of Summit Natural Gas of Missouri Inc. ("SNGMo"). The tariffs proposed a rate increase of \$7,472,131, or 26.5%, annually. The Commission is ordering SNGMo to file new tariffs in compliance with this report and order ("compliance tariffs") providing:

capital structure	cost of debt	return on equity
43% debt / 57% equity	3.21%	10.8%

The Commission estimates that the compliance tariffs will authorize a \$7,082,407 revenue increase in average residential gas bills as follows.²

Service Territory	Percentage	Amount
Gallatin	24.87%	\$25.22
Warsaw	38.59%	\$41.18
Rogersville	27.39%	\$25.67
Rogersville Optional	19.22%	\$13.55
Branson	32.64%	\$34.84
Branson Optional	26.14%	\$13.71

¹ As used in Commission practice, a tariff is a schedule governing rates and other terms of service. It may mean the whole set of such documents, or the subset for one service territory, or a single page.

² This number does not constitute a ruling, only an estimate of the overall impact of this report and order based on the *Additional Reconciliation* filed by the Commission's staff, EFIS No. 265, filed on October 20, 2014; and EFIS No. 268, *Staff Response to Commission Order*, filed on October 22, 2014.

The Commission reports its conclusions³ and, where required by law,⁴ separately states its findings of fact as follows.

I. Preliminary Matters

Before setting forth its decision, the Commission will address how this decision comes about.

A. Jurisdiction

The Commission has jurisdiction to determine SNGMo's tariffs because SNGMo sells natural gas ("gas") at retail for gain.⁵ SNGMo also sells transportation of natural gas, purchased from suppliers other than SNGMo, for gain.⁶ SNGMo has customers in 21 Missouri counties.⁷ SNGMo's activities bring it within the definition of a gas corporation⁸ and a public utility⁹ ("utility"). SNGMo can charge only those amounts set forth in its tariffs.¹⁰ The tariffs' content is subject to the Commission's determinations.¹¹

B. Filings

On January 2, 2014 SNGMo initiated this action by filing tariffs with a proposed effective date of February 1, 2014.¹² The Commission suspended the tariffs until December 1, 2014, the maximum time allowed by statute.¹³ The Commission granted motions for intervention from the following.

- Missouri Propane Gas Association ("MPGA") is a non-profit corporation representing sellers of propane gas, equipment, and appliances.¹⁴
- Missouri School Boards' Association ("MSBA") is a not-for-profit corporation which serves as a trade association for its member school districts. MSBA's

³ Section 386.420.2, RSMo Supp. 2013.

⁴ Section 536.090.2, RSMo 2000.

⁵ Electronic Filing and Information System ("EFIS") No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 4.

⁶ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 54.

⁷ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 4.

⁸ Section 386.020(18), RSMo Supp. 2013.

⁹ Section 386.020(43), RSMo Supp. 2013.

¹⁰ Section 393.130.1, RSMo 2000 RSMo Supp. 2013.

¹¹ Section 393.150, RSMo 2000. A tariff filed with the Commission may also take effect if the Commission makes no determination on it. Section 393.140(11), RSMo 2000.

¹² EFIS No. 2, *Tariff Tracking No. YG-2014-0285*, filed on January 2, 2014.

¹³ EFIS No. 9, *Notice of Contested Case and Order Suspending Tariff and Delegating Authority*, issued on January 8, 2014.

¹⁴ EFIS No. 18, *Order Granting Intervention*, issued on February 3, 2014.

membership consists of approximately 400 public school districts with approximately 2,000 individual school locations.¹⁵

- Missouri Division of Energy (“MoDoE”) is an agency of the State of Missouri charged by statute with energy policy development.¹⁶

On June 17, 18, and 19, 2014, the Commission convened local public hearings in cities within SNGMo’s service territories.¹⁷ On August 14, 2014, Staff filed a joint list of issues on behalf of all parties. On August 15, 2014, the parties filed position statements. On August 18 and 22, 2014, the parties filed partial settlements.¹⁸ On August 19, 20, and 22, 2014, the Commission convened an evidentiary hearing. On September 16, 2014, the parties filed initial briefs. On September 26, 2014, the parties filed reply briefs. At the Commission’s direction, the Staff filed reconciliations and related documents, to which the Commission received two responses.¹⁹

C. Procedure

At issue is the propriety of the tariffs, which means showing that the tariffs provide safe and adequate service at just and reasonable rates.²⁰ Toward that ultimate issue, the parties set forth their claims and defenses in an issues list and position statements, which function like pleadings to define the issues.²¹ The Commission has made each determination on consideration of each party’s allegations and arguments, and this report and order will not specifically discuss matters that are not dispositive.

D. Standards of Law and Policy

The Commission’s determination on the tariffs generally applies two standards. The standard for service is that SNGMo must provide “service instrumentalities and facilities as

¹⁵ EFIS No. 19, *Order Granting Intervention*, issued on February 4, 2014.

¹⁶ EFIS No. 20, *Order Granting Intervention*, issued on February 7, 2014.

¹⁷ EFIS No. 31, *Order Setting Local Public Hearings*, issued on March 12, 2014.

¹⁸ EFIS No. 148, *Partial Stipulation and Agreement As To Dual Fuel and Conversion of Appliances*, filed on August 18, 2014; EFIS No. 149, *Partial Stipulation and Agreement*, filed on August 18, 2014; and EFIS No. 154, *Partial Stipulation and Agreement as to Energy Efficiency, Weatherization, and Other Matters*, filed on August 22, 2014.

¹⁹ EFIS No. 270, *Response to Reconciliation Order Setting Date for Filing*, filed on October 23, 2014. EFIS No. 271, *Public Counsel’s Reply Regarding Return on Equity*, filed on October 23, 2014.

²⁰ Section 393.150, RSMo 2000.

²¹ In Commission practice, Staff coordinates the issues list with the other parties. A position statement sets forth the ruling that a party wants on an issue, with support in prepared testimony on file, which later comes into evidence. Most parties take a position on less than all issues. For example, most intervenors limit their participation to matters affecting their commercial or public policy purpose, and MoDoE settled every issue on which it took a position. The issues list and position statements appear late in the process because, in a tariff covering as much area as SNGMo serves, the parties cannot know any sooner which of the innumerable tariff provisions will be at issue.

shall be safe and adequate[.]”²² The standard for rates is that SNGMo must charge rates that are “just and reasonable[.]”²³

The standard for rates stands on constitutional provisions that protect the property interests of SNGMo.²⁴ The Commission will set rates that will pay enough to attract (the “cost of”) capital in the forms of debt and equity (“capital components”). But the statutes also require that rates shall be as “just and reasonable” to consumers as they are to the utility.²⁵ The balance of interests of investor and consumer does not appear in any single judicial formula,²⁶ nor in any one statute, but in the pragmatic adjustments that are the Commission’s means to a just and reasonable end.²⁷

All expert witnesses employed a collection of financial, accounting, or economic analyses known as cost-of-service rate-making. The Commission is using the cost-of-service model in determining just and reasonable rates. The Commission is also considering the public interest in its decision. The Commission has also heard testimony on the hardship that a rate increase will cause (“rate shock”). To mitigate rate shock, MSBA asks the Commission to deny, or reduce the amount of, any rate increase for SNGMo. In support, MSBA cites the expiration of gas service incentives that have favored MSBA members. Similarly, OPC cites the evidence presented at local public hearings, which was that because the cost of necessities like food and medication is increasing, an increase in gas service harms the most vulnerable of Missouri citizens: the poor.

The facts that MSBA and OPC cite in support of mitigating rate shock are within the Commission’s jurisdiction or authority in that they relate to the public interest. Further, SNGMo has an incentive to keep rates low because it must compete with alternative sources of heat or lose customers and the revenues they represent.²⁸ For those reasons, the Commission has considered rate shock and cost-of-service rate-making principles in each determination of compliance tariffs that will support safe and adequate service at just and reasonable rates.

II. Matters Settled

Those standards of law and policy determined the Commission’s rulings on the parties’ joint proposals on the following matters. Because these matters were disposed of by stipulation, consent order, or agreed settlement, the Commission need not separately state its findings of fact.²⁹ The Commission incorporates them as follows and attaches them to this report and order.

²² Section 393.130.1, RSMo RSMo Supp. 2013.

²³ Section 393.130.1, RSMo RSMo Supp. 2013; and Section 393.150.2, RSMo 2000.

²⁴ *Bluefield Water Works & Improvement Co. v. Public Serv. Comm’n of the State of West Virginia*, 262 U.S. 679, 690 (1923).

²⁵ *Valley Sewage Co. v. Public Service Comm’n*, 515 S.W.2d 845, 851 (Mo. App., K.C.D. 1974).

²⁶ *Hope Natural Gas Co.*, 320 U.S. at 586.

²⁷ *Bluefield*, 262 U.S. at 692; *State ex rel. Associated Natural Gas Co. v. Public. Serv. Comm’n*, 706 S.W.2d 870, 873 (Mo. App., W.D. 1985) (citing *Hope Natural Gas Co.*, 320 U.S. at 602-03).

²⁸ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 37-38.

²⁹ Section 536.090, RSMo 2000.

The Commission established the periods of time from which to draw the costs most probative to the tariffs' propriety³⁰ as suggested by the parties. An historic test year of the 12 months ending on September 30, 2013, shows the amount that SNGMo spends to provide safe and adequate service at just and reasonable rates. Those amounts are subject to change over time, so an update period through December 31, 2013, shows the known and measurable changes to those amounts. Other items, which significantly affect rates but occurred after the test year within a "true-up" period through June 30, 2014, bring the amount as up to date as reasonably possible. Therefore, the Commission incorporates those rulings into this report and order, as if fully set forth.

Also, the Commission compared the substantial and competent evidence on the whole record with the substantive provisions of the partial settlements. The Commission independently found and concluded that the partial settlements' substantive provisions support safe and adequate service at just and reasonable rates.³¹ Accordingly, the Commission ordered the deletion from the tariffs any provisions for free conversion. The free conversion program consisted of SNGMo converting propane customers to gas service without charge to the converting customer. The Commission ordered SNGMo to file compliance tariffs that include a conversion program in which the customer receiving the conversion pays the actual cost of conversion. Therefore, the Commission incorporates those rulings on the partial settlements into this report and order, as if fully set forth.

III. Matters for Determination

Those standards of law and policy also guide the Commission's determination of disputed matters, which include the valuation and accounting treatment of assets, the limitation of financial parameters, and the timing of rate increases.

Because this action is a contested case,³² for any matter not disposed of by stipulation, consent order, or agreed settlement, the Commission must separately state the findings of fact³³ that guide the Commission's rulings.³⁴ Each finding of fact stands on the Commission's consideration of the whole record of substantial and competent evidence.

SNGMo has the burden of proving the propriety of the tariffs,³⁵ and the quantum of proof necessary is a preponderance of the evidence.³⁶ The preponderance is the weight of persuasive value.³⁷ SNGMo must show that the evidence, and reasonable inferences from the evidence,³⁸ weighs more in favor³⁹ of SNGMo's allegations than against SNGMo's allegations.⁴⁰

³⁰ EFIS No. 15, *Order Determining Test Year, Update, and True-up*, issued on January 23, 2014.

³¹ EFIS No. 248, *Order Regarding Partial Stipulations and Agreements*, issued on September 3, 2014.

³² EFIS No. 9, *Notice of Contested Case and Order Suspending Tariff and Delegating Authority*, issued on January 8, 2014.

³³ Section 536.090, RSMo 2000.

³⁴ Section 536.090, RSMo 2000; *State ex rel. Aquila, Inc. v. Public Service Comm'n of State*, 326 S.W.3d 20, 28–29 (Mo. App., W.D. 2010).

³⁵ Section 393.150, RSMo 2000.

³⁶ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

³⁷ *State v. Davis*, 422 S.W.3d 458, 464 (Mo. App., E.D. 2014).

³⁸ *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

³⁹ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

⁴⁰ *Hager v. Director of Revenue*, 284 S.W.3d 192, 197 (Mo. App., S.D. 2009).

All parties refer to past Commission decisions, which may set forth analyses that are persuasive on the facts of a later case. But OPC goes farther, arguing that rates set by a decision today that departs from past decisions “would be a violation of the [past Commission] orders cited above.”⁴¹ Past decisions do not bind the Commission because the Commission is not subject to *stare decisis*.⁴² However, the Commission notes it is certainly preferable that it be consistent in its decisions; consistency provides certainty to entities that are subject to Commission jurisdiction and relying on Commission rulings.

As to competing proposals, the parties understandably struggle to articulate the burden of proof because case law from outside the compliance tariff context is not helpful in this regard. The parties’ citations include case law discussing the standard on a motion for directed verdict,⁴³ the standard set by statute for judicial review of an administrative action for driving while intoxicated,⁴⁴ and the standard for challenging an order of the Commission in a complaint on a violation of law,⁴⁵ and shifting burdens of proof. None of those discussions applies in lieu of, or in addition to, the statute setting forth the burden of proof for this action: SNGMo must show the propriety of the tariffs.⁴⁶

More than one proposal may support safe and adequate service at just and reasonable rates. When that happens, the Commission simply must determine which proposal supports safe and adequate service at just and reasonable rates better than another. The Commission makes that determination according to the standards of law and policy already set forth.

Where the evidence conflicts, the Commission determines which evidence is most credible. The Commission’s determinations of credibility are implicit in the Commission’s findings of fact.⁴⁷ No law requires the Commission to expound upon which portions of the record the Commission accepted or rejected.⁴⁸ Nevertheless, the Commission notes that none of the matters determined in this report and order stands on evidence weighing equally between prevailing parties and non-prevailing parties.

⁴¹ EFIS No. 255, *Initial Brief of The Office of the Public Counsel*, filed on September 16, 2014, page 9. In fact, OPC goes even farther than that, citing Staff’s position in a past Commission action: Case No. GA-2007-0168, *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Branson, Branson West, Reed’s Spring and Hollister, Missouri.* That position did not find favor with the Commission, which may account for the change in philosophy that has made Staff’s position in this action more persuasive to the Commission. Case No. GA-2007-0168, EFIS No. 88, *Report and Order*, issued on February 5, 2008, page 14-18.

⁴² “[T]he PSC is not bound by *stare decisis* based on prior administrative decisions, so long as its current decision is not otherwise unreasonable or unlawful.” *State ex rel. Aquila, Inc. v. Pub. Serv. Comm’n of State*, 326 S.W.3d 20, 32 (Mo. App. 2010).

⁴³ *McCloskey v. Kopljar*, 46 S.W.2d 557, 563 (Mo. Banc 1932)

⁴⁴ *White v. Director of Revenue*, 321 S.W.3d 298, 304-05 (Mo. banc 2010);

⁴⁵ *In re Request for an Increase in Sewer Operating Revenues of Emerald Pointe Util. Co.*, 438 S.W.3d 482, 490 (Mo. App., W.D. 2014).

⁴⁶ Section 393.150, RSMo 2000.

⁴⁷ *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 26 (Mo. banc 2011).

⁴⁸ *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

A. Background

The remaining disputes are almost entirely about balancing the social utility of expanding gas service while protecting current customers. SNGMo has a business plan that includes bringing gas service to areas never before served. All other parties ask the Commission to protect customers from that plan's alleged excesses. Discussion of these matters omits disclosure of details closed as required by statute and implemented by Commission regulation, but with citation to the record.

Findings of Fact

1. JP Morgan Asset Management advises Infrastructure Investments Fund,⁴⁹ a private equity investor in which only large institutional investors or very wealthy individuals may participate.⁵⁰ Infrastructure Investments Fund, sometimes acting through related entities, bought SNGMo and other Missouri gas companies and systems over the following periods.

2. SNGMo's core territory is the service areas Gallatin and Warsaw. From 2007 to 2010, Infrastructure Investments Fund bought Summit Utilities, Inc., which owned subsidiaries⁵¹ including Missouri Gas Utility, Inc. Missouri Gas Utility, Inc. owned the former municipal gas distribution systems in Gallatin and Hamilton ("Gallatin").⁵² Missouri Gas Utilities, Inc. also served Warsaw.⁵³ On November 17, 2011, Missouri Gas Utility, Inc. changed its name to SNGMo.⁵⁴

3. SNGMo also provides service in the legacy territory of service areas Branson and Rogersville. From 2008 to 2011, Infrastructure Investments Fund bought the assets of Tartan Company, L.C., which served Branson and Rogersville with a system later known as Southern Missouri Natural Gas ("Southern Missouri").⁵⁵ On January 3, 2012, Infrastructure Investments Fund sold its Southern Missouri system to its subsidiary SNGMo.⁵⁶

4. Further, SNGMo's newest territory is the service area Lake of the Ozarks. Effective July 27, 2012, the Commission also granted SNGMo a certificate of convenience and necessity to serve the Lake of the Ozarks service territory.⁵⁷

5. Because SNGMo is solely owned by Summit Utilities, Inc., which is solely owned by Infrastructure Investments Fund, which is advised by JP Morgan Asset Management, those entities determine SNGMo's business conduct as to each SNGMo service territory.

6. SNGMo sells gas at retail to some of its customers.⁵⁸ Other customers buy their gas from retailers other than SNGMo and pay SNGMo for transportation only.⁵⁹

⁴⁹ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 14.

⁵⁰ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 21.

⁵¹ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 4.

⁵² EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 14.

⁵³ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 4.

⁵⁴ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 14.

⁵⁵ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 14.

⁵⁶ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 14.

⁵⁷ Case No. GA-2012-0285, EFIS No. 24, *Order Granting Certificate of Convenience and Necessity*, issued on July 17, 2014.

⁵⁸ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 55.

⁵⁹ EFIS No. 185, Exh. No. 104 *Staff Report Revenue Requirement Cost of Service*, page 54.

Discussion and Conclusions of Law

The Commission's regulations describe this case as a general rate action.⁶⁰ But it is crucial to understanding the parties' arguments that gas bills for only some of SNGMo's service territories are the subject of the tariffs and that, in those territories subject to the tariffs, only part of the gas bill is at issue. The tariffs do not put the service area Lake of the Ozarks at issue. And, in the service areas Gallatin, Warsaw, Branson, and Rogersville, the price that SNGMo charges a customer for gas is not at issue.

Also, because the tariffs address only the fixed monthly, non-gas, charge, a percentage "rate increase," as the parties use that term, is not a percentage increase of a customer's entire gas bill. For example, if a party's gas bill is 50 percent non-gas charge, a "25 percent rate increase" may mean only a 12.5 percent increase in that party's gas bill (50% x 25% = 12.5%).

With that background set forth, the Commission will examine the issues remaining in dispute, which include SNGMo's rate base, and the return to be allowed on that rate base, and the rate design by which SNGMo will collect its new rates.

B. Expenses and Capital Assets

Cost-of-service rate-making determines SNGMo's rates by calculating SNGMo's revenue requirement.⁶¹ The revenue requirement is how much it costs SNGMo, both capital items and expenses, to provide safe and adequate service plus returns sufficient to service debt and equity and continue attracting capital.⁶² Revenue requirement includes operating expenses, and capital assets ("rate base") and returns. The returns must be enough to continue attracting capital.⁶³

To help define just and reasonable rates, the Commission has published regulations. Published regulations have the force of law.⁶⁴ The Commission's regulations incorporate the federal Uniform System of Accounts ("USoA"):

Beginning January 1, 1994, every gas company subject to the commission's jurisdiction **shall** keep all accounts in conformity with the **Uniform System of Accounts** Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act, as prescribed by the Federal Energy Regulatory Commission (FERC) and published at 18 CFR part 201 [⁶⁵]

The parties dispute whether the tariffs shift the business risk of expansion from SNGMo's owners, who stand to gain from success, to customers who do not.

⁶⁰ 4 CSR 240-2.065(1).

⁶¹ *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

⁶² *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

⁶³ *Hope Natural Gas Co.*, 320 U.S. at 603 (1944).

⁶⁴ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. App., W.D. 2006).

⁶⁵ 4 CSR 240-40.040(1) (emphasis added).

Findings of Fact

1. SNGMo is the smallest gas utility in Missouri. On September 30, 2013, SNGMo had 15,106 customers, which is one quarter of the size of the next largest Missouri gas company.⁶⁶ Six out of seven SNGMo customers are residential customers, and residential use is less reliable than commercial or industrial. SNGMo's customer base is therefore relatively weak for supporting its rate base.

2. SNGMo's business plan presents several risks to profitability, including competition, high construction costs, lower revenue, and delayed returns.⁶⁷ In furtherance of that plan, SNGMo invested capital in constructing mains, including in the service area Lake of the Ozarks and \$47 million in the service area Branson alone,⁶⁸ and paid no dividends to the direct and indirect investors and sole owners Summit Utilities Inc. and Infrastructure Investments Fund.⁶⁹

3. Despite that investment and those incentives, SNGMo's customer base has not increased as expected, and SNGMo's earnings have been less than expected by half, so there are fewer customers to pay for the newly built infrastructure ("shortfall").⁷⁰

Discussion and Conclusions of Law

As to the items at issue, Staff, OPC, and MPGA ask the Commission to hold SNGMo's rates to SNGMo's cost of service, focusing on the costs of assets actually used in delivering service. The concern is that SNGMo, not having gained the customer base it sought, will pass the costs of capacity not actually used ("excess expansion") on to its customers through inflated rates.

MPGA also asks the Commission to hold SNGMo's rates to the true cost of service. MPGA is candid about its position as an economic competitor, and makes plain that rates artificially low will give SNGMo an advantage over MPGA's members in the marketplace that the Commission does not regulate. But MPGA also cites sound policy grounds for rates at cost of service. It argues that rates below cost mislead industry and residents as to the true costs of service, which will eventually reveal themselves in higher rates, leading to inefficient investment, especially in construction.

Sound policy offers more energy options to Missouri residents even though doing so, as SNGMo's business plan intends, presents risks. The Commission certified SNGMo to expand gas services into new territory. SNGMo's reward for venturing into new territory is the opportunity to take that business risk. SNGMo chose to pursue the business risk of expansion in the service area Lake of the Ozarks and other service territories.⁷¹ That business risk is an option for shareholders, but not for existing customers, so customers should not be required to shield SNGMo from the consequences of shortfall and excess capacity.⁷² In other words, SNGMo would not share gains with its customers, so SNGMo should not shift losses to customers.

⁶⁶ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 20.

⁶⁷ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 5, line 1-20.

⁶⁸ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 15.

⁶⁹ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 15.

⁷⁰ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 17.

⁷¹ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 18.

⁷² EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 18.

i. Remedies for Excess Capacity: Denial, Imputation, or Account 105

The Commission is ordering SNGMo to file compliance tariffs that remedy SNGMo's excess capacity by recording certain amounts to an account that does not count toward rate base, and that do not impute any volumes or customer counts in any service area.

Findings of Fact

1. Any utility attempting to expand its service faces uncertainty.⁷³ That uncertainty is only partly mitigated in feasibility studies. Feasibility studies project target amounts of sales or customer base.⁷⁴ Target amounts set in feasibility studies do not constitute the minimum amount of sales or customer base to make a gas system functional.⁷⁵ In other words, a shortfall does not per se make a gas company unworkable.

a. Rogersville

2. In 1994, the Commission first permitted SNGMo's predecessor Tartan Company, L.C. ("Tartan") to provide gas service in the service area Rogersville.⁷⁶ The Commission issued the certificate of convenience and necessity subject to conditions. The conditions included imputing 1,797,000 million cubic feet of gas ("Mcf") for rate-making purposes:

That Tartan is required to file a rate case on or before the two-year anniversary of the commencement of service in West Plains. A normalized volume level of at least 1,797,000 Mcfs shall be imputed for purposes of determining revenues associated therewith in the second year anniversary rate case, all subsequent rate cases, and actual cost adjustment (ACA) cases for determining appropriate rates. In the event the normalized test year volume level for the service area is less than 1,797,000 Mcfs per year, Tartan may not defer any costs associated therewith to a future rate proceeding, but in the event the normalized test year volume level for the service area exceeds 1,797,000 Mcfs per year, this actual volume level shall be utilized for establishing rates instead. The provisions of this paragraph are deemed to apply to any of Tartan's successors or assigns [⁷⁷]

3. The imputation assumed 197,626 Mcf of usage in cities where SNGMo has never built any system.⁷⁸ The feasibility study supporting the throughput condition assumed that an average residential customer would use 100 Mcf per year.⁷⁹ An average residential

⁷³ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

⁷⁴ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5.

⁷⁵ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5.

⁷⁶ Case No. GA-94-127, *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain Gas Facilities*.

⁷⁷ Case No. GA-94-127, EFIS No. 75, *Report and Order*, issued September 16, 1994, page 9, fourth full paragraph.

⁷⁸ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 277, line 3, to page 280, line 15.

⁷⁹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 18-19

customer in service area Rogersville has never used 100 Mcf per year.⁸⁰ In 2014, probably due to conservation, the average residential customer used 55.82 Mcf per year.⁸¹

4. In calendar year 2013, SNGMo's throughput for the service area Rogersville as originally certified was 1,869,737 Mcf.⁸²

5. Service area Rogersville is economically viable as a separate system, and its customer base can bear the full cost of service.⁸³

b. Gallatin

6. In 1995, the city of Gallatin and the city of Hamilton each built a municipal gas system.⁸⁴ Neither system attracted as much connection as projected.⁸⁵ By summer of 2004, each city had ceased to make payments on their system, and each system was subject to foreclosure.⁸⁶

7. By September 2004, each system had gas enough only to last three months.⁸⁷ Summit Utilities, Inc. formed Missouri Gas Utilities, Inc., bought the Gallatin and Hamilton systems, secured gas supplies, even though SNGMo did not own the systems, and began operating the systems as service area Gallatin on January 1, 2005.⁸⁸ Because of those actions, the customers of the Gallatin and Hamilton systems did not lose heat during the winter of 2004 and 2005.⁸⁹

8. SNGMo relieved the former city owners of the municipal debt that had financed the Gallatin and Hamilton systems. SNGMo purchased the Gallatin and Hamilton systems at a deep discount, and so recorded the Gallatin and Hamilton systems value at their purchase price instead of the capital investment it took to build them.⁹⁰ That recording results in a lower rate base than using the capital investment.⁹¹

9. SNGMo operated the distressed systems under existing rates without a determination of revenue requirement.⁹² Therefore, any shortfall was at SNGMo's risk.⁹³

⁸⁰ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 18-19

⁸¹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 18-19

⁸² EFIS No. 149, *Partial Stipulation and Agreement*, filed on August 18, 2014, Appendix E.

⁸³ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

⁸⁴ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

⁸⁵ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

⁸⁶ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

⁸⁷ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

⁸⁸ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

⁸⁹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

⁹⁰ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8-9.

⁹¹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

⁹² EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

⁹³ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

10. Since 2005, SNGMo has expanded the service area Gallatin in territory and customer base⁹⁴ but the expansion is less than that projected in the 2005 feasibility studies that accompanied SNGMo's application.⁹⁵

11. Service area Gallatin is economically viable as a separate system and its customer base can bear the full cost of service.⁹⁶

c. Warsaw and Branson

12. SNGMo overbuilt significantly, creating excess capacity in service areas Branson and Warsaw.⁹⁷ On a peak day, customers use 21.44 percent of the system's main capacity in Branson and 43.29 percent of the system's main capacity in service area Warsaw.⁹⁸

13. Customers will be paying for that excess capacity, even though they do not use it, if the cost of that excess capacity counts toward SNGMo's rate base. But if SNGMo's rate base excludes the cost of the excess capacity, that cost will not go into rates. Whether that cost is part of rate base depends on the account to which SNGMo records it, so recording puts amounts into rate base or removes amounts from rate base.

14. Removing \$27.64 million from rate base in service area Branson will result in service area Branson becoming economically viable.⁹⁹

15. Removing \$6.97 million from rate base in service area Warsaw will result in service area Warsaw becoming economically viable.¹⁰⁰

Discussion and Conclusions of Law

The parties dispute how much of SNGMo's excess capacity is attributable to the ordinary growth pattern of new gas service, economic downturns, or over-aggressive business practices. But all parties agree that, despite SNGMo's expansion in territory and customer base for each service area, SNGMo has a shortfall and excess capacity in both service areas Gallatin and Hamilton. The proffered remedies are several: inflate demand to meet excess capacity, deflate rate base to meet shortfall, or simply deny any rate increase.

The last is the easiest to address. OPC and MSBA both suggest that the Commission should deny any rate increase in every service area based on a failure to carry the burden of proof. But no party alleges that the cost of service in every service area is the same as, or less than, when SNGMo started providing service; and analysis of the cost of service is fundamental to just and reasonable rates. Therefore, the record does not support a denial of any rate increase in every service territory.

⁹⁴ EFIS No. 224, Exh. No. 203, *Meisenheimer Surrebuttal*, page 6.

⁹⁵ EFIS No. 224, Exh. No. 203, *Meisenheimer Surrebuttal*, page 6.

⁹⁶ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

⁹⁷ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

⁹⁸ EFIS No. 207, Exh. No. 126, *Surrebuttal Testimony of Lesa Jenkins*, page 8-9 .

⁹⁹ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

¹⁰⁰ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

OPC also suggests inflating demand to meet excess capacity by imputing hypothetical sales volumes or customer counts to SNGMo ("imputation"). In support of imputation, OPC cites language related to financial responsibility in a long list of past Commission orders, which OPC characterizes as conditions unmet by SNGMo. OPC's arguments fail for several reasons.

First, this action will not include any conclusion that SNGMo has violated any term of any Commission order, including any term of a stipulation and agreement incorporated into an order. Whether SNGMo has violated a Commission order is expressly subject to a complaint alleging violations as specified by statute.¹⁰¹ That statute, Commission regulations, and case law govern a complaint alleging violations. They describe the pleading, allocate the burden of proof to OPC,¹⁰² and mandate other procedures that the Commission must employ when determining whether SNGMo has violated a Commission order. Those procedures have not occurred because OPC has filed no complaint, so the Commission will not make the determination that OPC seeks.¹⁰³

Also, in all the past Commission decisions cited, OPC cites only generalized directives, except one sentence governing ratemaking. Other language related to financial responsibility for the risks of expansion consists of projections of customers and sales from feasibility studies. OPC relies almost entirely on feasibility studies. OPC alleges, without citation, that feasibility studies persuaded the Commission to permit SNGMo to expand its service areas. Feasibility studies constitute no standard of any kind.¹⁰⁴

Further, as Staff notes, imputation constitutes a departure from the judicially-endorsed principles of cost-of-service rate-making. That departure from cost-of-service realities occurs on both sides of the equation: imputation uses both hypothetical demand and excess capacity. Such departures are unnecessary where, as here, imputation is not the exclusive route to financial responsibility, as shown by SNGMo and Staff.

SNGMo and Staff suggest reducing rate base to meet the shortfall, within cost-of-service rate-making techniques, which best balances all interests before the Commission.

a. Rogersville

Only in service area Rogersville did the Commission impose any rate-making condition, imputing 1,797,000 Mcfs, in setting rates. And the rates were not those of SNGMo, but of the predecessor Tartan. SNGMo's actual sales volume has exceeded that imputation. Moreover, the factual basis for the condition is obsolete. The feasibility study supporting the imputation assumed an average residential customer would use 100 Mcf per year, which has never occurred.¹⁰⁵ In 2014, the average residential customer used 60 percent less than what was assumed in 1994.¹⁰⁶ The Commission also assumed that customers would consume 197,626 Mcf of gas. The construction contemplated in the feasibility study never

¹⁰¹ Section 396.390, RSMo 2000.

¹⁰² *AG Processing, Inc. v. KCP & L Greater Missouri Operations Co.*, 385 S.W.3d 511, 516 (Mo. App., W.D. 2012).

¹⁰³ *In re Request for an Increase in Sewer Operating Revenues of Emerald Pointe Util. Co.*, 438 S.W.3d 482, 490 (Mo. App., W.D. 2014).

¹⁰⁴ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5.

¹⁰⁵ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 18-19

¹⁰⁶ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 18-19

occurred so there has never been any actual infrastructure, usage, cost, or revenue to use for the purpose of cost-of-service rate-making.¹⁰⁷ SNGMo and Staff agree that the 20-year-old condition stands on no remaining relevant evidence and ask for the elimination of that condition.

In contrast to eliminating the condition, as SNGMo and Staff suggest, OPC advocates continuing and expanding the condition by increasing the imputation beyond the originally certified areas. In support of this proposal, OPC offers no evidence to support any new imputed amount. The record shows that eliminating the imputation supports safe and adequate service at just and reasonable rates better than ordering any imputation.

Therefore, the Commission will not order any remedy for any excess capacity in service area Rogersville, and will order SNGMo to file compliance tariffs that eliminate the imputation for service area Rogersville.

b. Gallatin

As to Gallatin, OPC bases its argument for imputation on an allegation that SNGMo has failed to achieve projections of conversion from, and competition with, propane:

The Company shall be responsible in future rate cases for any failure of this system to achieve forecasted conversion rates and/or its inability to successfully compete against propane. [¹⁰⁸]

OPC has not offered any evidence on SNGMo's performance against propane in service area Gallatin. OPC argues that the Commission should infer that the absence of conversions is the cause of the shortfall, but the record shows nothing about the shortfall in service area Gallatin that is different from other service areas to support that inference.

Also, SNGMo notes several facts that weigh against imputation. SNGMo took a substantial risk in rescuing two distressed municipal systems that were three months from running out of fuel in December 2004.¹⁰⁹ Because SNGMo recorded the systems at their discount purchase price, instead of the capital investment it took to build them,¹¹⁰ the service area has a lower rate base than using the capital investment.¹¹¹ SNGMo operated the systems under existing rates without a determination of revenue requirement,¹¹² so SNGMo risked under-earning.¹¹³ Service area Gallatin is now economically viable as a separate system, and its customer base can bear the full cost of service.¹¹⁴

Therefore, the Commission will not order any remedy for any excess capacity in service area Gallatin.

¹⁰⁷ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 277, line 3, to page 280, line 15.

¹⁰⁸ Case No. GO-2005-0120, EFIS No. 38, *Order Approving Stipulation and Agreement*, filed on December 8, 2004.

¹⁰⁹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 7-8.

¹¹⁰ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8-9.

¹¹¹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

¹¹² EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

¹¹³ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 8.

¹¹⁴ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

c. Warsaw and Branson

No party disputes that there is significant excess capacity in service areas Branson and Warsaw.¹¹⁵ Just and reasonable rates do not include infrastructure that does not serve customers. Therefore, customers must be protected from rates that do not support safe and adequate service.

SNGMo and Staff proffer a remedy suggested by the law governing the characterization of assets. To help define just and reasonable rates, the Commission has published regulations. The Commission's regulations incorporate the federal Uniform System of Accounts ("USoA"):

Beginning January 1, 1994, every gas company subject to the commission's jurisdiction **shall** keep all accounts in conformity with the **Uniform System of Accounts** Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act, as prescribed by the Federal Energy Regulatory Commission (FERC) and published at 18 CFR part 201 [¹¹⁶]

SNGMo and Staff suggest recording excess capacity in USoA Account 105, Gas Plant Held for Future Use ("Account 105"), which holds assets not counted in rate base.

Account 105 provides:

A. This account shall include the original cost of gas plant (except land and land rights) owned and held for future use in gas service under a definite plan for such use, to include: (1) Property acquired (except land and land rights) but never used by the utility in gas service, but held for such service in the future under a definite plan, and (2) property (except land and land rights) previously used by the utility in gas service, but retired from such service and held pending its reuse in the future, under a definite plan, in gas service. This includes production properties relating to leases acquired on or before October 7, 1969.

* * *

E. The property included in this account shall be classified according to the detail accounts (301 to 399) prescribed for gas plant in service and the account shall be maintained in such detail as though the property were in service.

The evidence shows, and no party disputes, that an item in Account 105 does not count in rate base, and thus in rates, until it comes into use ("repatriation").¹¹⁷

In that regard, SNGMo and Staff offer the following specifics. Based on actual usage,¹¹⁸ SNGMo and Staff agree that the main lines worth \$27.64 million in service area Branson, and \$6.97 million in service area Warsaw, represent the excess capacity to remove from rate base. For repatriation, SNGMo and Staff suggest:

¹¹⁵ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

¹¹⁶ 4 CSR 240-40.040(1) (emphasis added).

¹¹⁷ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 251, line 23, to page 252, line 20.

¹¹⁸ EFIS No. 207, Exh. No. 126, *Surrebuttal Testimony of Lesa Jenkins*, page 8-9 .

- (1) Annual determination based on December 31 (year-end) plant balances;
- (2) Warsaw only - Calculate the amount of FERC Account 376 and FERC Account 378 that should be assigned to Lake of the Ozarks based on most recent winter peak usage/transportation percentages. The amount by which to multiply the percentages will be the sum of year end FERC Accounts 105-376 and 105-378 for plant and reserves, and the year end FERC Accounts 101-376, 101-378, 108-376, and 108-378 balances;
- (3) Warsaw only - The applicable Warsaw plant amounts from the calculation in (2) will be subjected to the same calculation shown in Schedule TRJ-4 after subtracting the portion applicable to Lake of the Ozarks;
- (4) Warsaw only - The [resulting unused] capacity investment will be compared to the plant balances in FERC Account 105, and an accounting adjustment made to transfer a portion of the year-end balance of FERC Account 105 to FERC Accounts 101-376, 101-378, 108-376 and, 108-378;
- (5) Branson calculations will occur similar to Warsaw except without the need for the intermediate analytical step to split shared assets;
- (6) Depreciation expense will not be calculated on FERC Account 105 gross plant balances; and,
- (7) Depreciation expense on repatriated gross plant will begin on January 1 of the year that succeeds the year-end calculations.¹¹⁹

Recording to Account 105 on those terms has several advantages as follows.

Where imputation addresses the growth side of the equation that SNGMo was not successful in controlling, recording to Account 105 addresses the matter that was in SNGMo's control: capacity. Customers will pay for—and only for—what they use.¹²⁰ Such accounting will make service areas Branson and Warsaw economically viable,¹²¹ match rates with the true cost of service as MPGA desires, and allocate the financial responsibility for excess capacity to SNGMo as OPC desires.

OPC again argues for imputations from long-ago projections that include cities that SNGMo is not currently serving. The Commission rejects that argument as less persuasive than SNGMo and Staff's proposed remedy. OPC argues that recording excess capacity to Account 105 will not address operating and management expenses associated with those assets. But OPC offers no evidence quantifying or otherwise supporting that allegation. OPC also argues against the terms related to depreciation. Again OPC offers no evidence or authority.

Therefore, SNGMo shall file compliance tariffs that record SNGMo's excess capacity in service areas Branson and Warsaw to Account 105 as described, and that do not impute any volumes or customer counts.

¹¹⁹ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 21, line 13, to page 22, line 16.

¹²⁰ EFIS No. 166, Exh. No. 6, *Surrebuttal Testimony of Timothy R. Johnston*, page 6.

¹²¹ EFIS No. 209, Exh. No. 128, *Surrebuttal Testimony of Amanda C. McMellen*, page 5-8.

ii. Southern Missouri Assets: Net Original Cost

The recording of assets under USoA is also at issue as to the assets formerly of Southern Missouri. The Commission is ordering SNGMo to book the former assets of Southern Missouri at net original cost (sometimes called “net book value” in the parties’ evidence and arguments) because that is the standard set by law. OPC has not shown that a variance from that standard will lead to safe and adequate service at just and reasonable rates.

Findings of Fact

1. In File No. GM-2011-0354, the Commission granted the application of SNGMo (then known as Missouri Gas Utilities, Inc.) to acquire the assets (variously called “operating system” or “plant”) of Southern Missouri.¹²²

2. When SNGMo bought the assets of Southern Missouri, SNGMo acquired the physical structures through which Southern Missouri delivered gas for \$19,565,924¹²³ less than the original cost, less accumulated depreciation.

Discussion and Conclusions of Law

Determining rate base includes valuing the assets that SNGMo is devoting to gas service. Those assets include the assets formerly belonging to Southern Missouri. The Commission has the authority to assess the value of SNGMo’s property.¹²⁴

OPC argues that SNGMo has a “burden of establishing” “an independent basis for concluding that a negative acquisition adjustment should benefit [SNGMo] at the expense of ratepayers.”¹²⁵ OPC cites no authority in support of that assertion. The authority defining the burden of proof is set forth in the statutes: the burden to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation [¹²⁶]

The law also provides that SNGMo shall record the value of the assets at net original cost.

a. The Law Requires Net Original Cost

Published regulations have the force of law.¹²⁷ The Commission’s regulations specifically require SNGMo to follow USoA on valuation of plant:

Regarding plant acquired or placed in service after 1993, when implementing section (1), each gas corporation subject to the commission's jurisdiction **shall—**

¹²² File No. GM-2011-0354, *In the Matter of the Joint Application of Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas and Missouri Gas Utility, Inc. for Approval of the Merger of Southern Missouri Natural Gas with Missouri Gas Utility, Inc., and for Certain Related Transactions*, Order Approving Unanimous Stipulation and Agreement, issued on September 28, 2011.

¹²³ EFIS No. 221, Exh. No. 200, *Roth Rebuttal*, page 5-6, SNGMo’s brief page 12.

¹²⁴ Section 393.230.1, RSMo 2000.

¹²⁵ EFIS No. 258, *Reply Brief of the Office of the Public Counsel*, filed on September 26, 2014, page 15, last paragraph.

¹²⁶ Section 393.150.2, RSMo 2000.

¹²⁷ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n*, 210 S.W.3d 330, 337 (Mo. App., W.D. 2006).

(C) **Record** gas plant acquired as an operating unit or system, estimated if not known, except as otherwise provided by the text of the intangible plant accounts, when implementing the provisions of Part 201 **Gas Plant Instructions 2.A** [. ¹²⁸]

Gas Plant Instruction 2.A requires SNGMo to record all plant as follows:

All amounts included in the accounts for gas plant acquired as an operating unit or system, except as otherwise provided in the texts of the intangible plant accounts, **shall** be stated at **the cost** incurred by the **person who first devoted the property to utility service** [. ¹²⁹]

The emphasized language is USoA's definition of original cost:

Original cost, as applied to gas plant, means the **cost** of such property to **the person first devoting it to public service**. [¹³⁰]

USoA repeats the point in describing the account for gas plant:

Gas plant in service.

A. This account shall include **the original cost of gas plant** [. ¹³¹]

And specifically for gas plant purchased:

Gas plant purchased or sold.

* * *

(1) **The original cost** of plant, estimated if not known, shall be credited to account 102, Gas Plant Purchased or Sold, and concurrently charged to the appropriate gas plant in service accounts and to account 104, Gas Plant Leased to Others, account 105, Gas Plant Held for Future Use, 105.1, Production Properties Held for Future Use, and account 107, Construction Work in Progress--Gas, as appropriate. [¹³²]

Those provisions of law define what SNGMo must prove as to the former Southern Missouri assets—original cost net depreciation—and SNGMo has carried that burden.

¹²⁸ 4 CSR 240-40.040(3).

¹²⁹ 18 C.F.R. § 201, Gas Plant Instructions 2.A (emphasis added).

¹³⁰ 18 C.F.R. § 201, Definition 26 (emphasis added).

¹³¹ 18 C.F.R. § 201, Account 101 (emphasis added).

¹³² 18 C.F.R. § 201, Instruction 5 (emphasis added).

b. Capital Actually Expended

OPC argues that SNGMo's rates should not include the difference between the net original cost and the purchase price ("difference") because SNGMo did not pay the difference, but OPC's citations show otherwise. OPC relies on a statute that mentions a reasonable return on capital:

In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies. [¹³³]

OPC's argument implies that the statute restricts the Commission to a reasonable average return upon capital that SNGMo actually expended. That is not the statute's language.

The statute's plain language, like the plain language of the regulations, does not require SNGMo to have expended anything. The statute and the regulations simply protect capital investment. Those provisions make no distinction as to where title to the capital asset happens to be when the Commission sets rates. The result is that customers of the capital asset's owner will, through rates, return the capital once and only once.

OPC's premise is that the statute restricts the Commission's authority to set rates, but the statute's plain language expands Commission authority, as the statute's context shows. That context is a rate-setting procedure not used in this action. This action is SNGMo's filing of tariffs. The statute addresses the procedure for a complaint on rates. The statutes provide:

1. Upon the complaint in writing of [specified persons] as to the . . . price of gas, . . . the commission shall investigate as to the cause of such complaint [¹³⁴]

The next following statute provides for notice, investigation, and an opportunity to be heard. OPC's citation comes from directives expressly authorizing the Commission to decide issues beyond the scope of the complaint:

1. . . . An investigation may be instituted by the commission as to any matter of which **complaint** may be made as provided in sections 393.110 to 393.285, or to enable it to **ascertain the facts requisite to the exercise of any power conferred upon it.**

* * *

4. In determining the price to be charged for gas, . . . the commission may consider **all facts** which in its judgment have any **bearing upon a proper determination** of the question although **not set forth in the complaint** and **not within the allegations** contained therein, with due regard, among other things, to a reasonable average return upon

¹³³ Section 393.270.4, RSMo 2000.

¹³⁴ Section 393.260.1, RSMo 2000.

capital actually expended and to the necessity of making reservations out of income for surplus and contingencies [¹³⁵]

The Commission's reading has support in case law cited by OPC:

The statute (§ 393.270, Par. 4) says that the Commission may consider all facts which in its judgment 'have any bearing upon a proper determination of the question [of the prices to be charged for water], with due regard, among other things, to a reasonable average return upon capital actually expended', etc. 'Due regard' to one factor, 'among other things', simply requires consideration of that factor. It is not preclusive of other relevant factors. Indeed, the phrase 'among other things' clearly denotes that 'proper determination' of such charges is to be based upon *all* relevant factors. [¹³⁶]

The statute is thus expansive, not restrictive.

And more specifically, the statute that OPC cites for the Commission's evaluation authority similarly expands the Commission's consideration to all relevant factors determining such value:

The commission shall have the power to ascertain the value of the property of every gas corporation . . . in this state and **every fact which in its judgment may or does have any bearing on such value**. The commission shall have power to make revaluations from time to time and to ascertain all new construction, extensions and additions to the property of every gas corporation [¹³⁷]

Therefore, the Commission concludes that the statutes do not restrict the Commission's rate-setting power to a reasonable average return upon capital that SNGMo actually expended. Returning to *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n*, "[W]e can think of no way to ascertain 'capital actually expended' except to find the cost of the utility plant at the time the properties were first devoted to public service."¹³⁸

State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n was not the first opinion to employ net original cost. In two other cases that OPC cites, a non-regulated entity transferred assets to a public utility. The transactions are called contribution in aid of construction. The person first devoting the asset to public service had no cost. The original cost, and hence the net original cost, was zero. When no regulated entity has expended capital, no return is due. That was the context of *State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n*,¹³⁹ in which the Missouri Supreme Court stated succinctly:

¹³⁵ Section 393.270.4, RSMo 2000 (emphasis added).

¹³⁶ *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n*, 308 S.W.2d 704, 718-19 (Mo. banc 1957). And identical language related to sewer companies receives an identical treatment in another cases that OPC cites. *State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n*, 537 S.W.2d 388, 392 (Mo. 1976).

¹³⁷ Section 393.230.1, RSMo 2000 (emphasis added).

¹³⁸ 308 S.W.2d at 712.

¹³⁹ 537 S.W.2d 388 (Mo. banc 1976).

[T]he antithesis of a just and reasonable rate is one that would permit a utility's stockholders to recover a return on money which they, in fact, never invested. [¹⁴⁰]

The Court of Appeals explained that principle a quarter-century later:

[C]ourts have held that “contributions in aid of construction” may not be included in determining the “rate base” for ratemaking purposes. These cases do not help the plaintiffs. Both are authority only for the proposition that a utility may not have these contributed assets considered toward justifying a *rate* increase to customers. The courts hold to do so would result in two inherent inequities: first, to allow the utilities to include these “contributions” in the rate base is to ask the utility customers to pay twice for the same thing. Second, it allows the utility's shareholders to receive a return on money which they never invested. [¹⁴¹]

Neither of those cases involved the sale of one regulated entity's assets to another. OPC has not shown that those holdings apply because OPC has not shown that the net original cost was zero.

c. Variance and Affiliate Transactions

In the alternative, OPC cites the Commission regulation allowing for a variance from USoA.¹⁴² OPC did not mention a variance in the issues list or in its position statement. OPC raises that procedure for the first time in its reply brief, and only at the prompt from SNGMo.¹⁴³ The Commission will not decide this issue because it was not timely raised. OPC also cites the Commission's affiliate transaction rule.¹⁴⁴ Likewise, the Commission will not determine in this action whether SNGMo has committed a violation of the affiliate transaction rule because whether SNGMo has violated the affiliate transaction rule is expressly subject to a complaint alleging violations of law as specified by statute.¹⁴⁵

c. Conclusion

Therefore, SNGMo shall file compliance tariffs that record the value of former Southern Missouri assets at net original cost.

C. Rate of Return

Having determined the revenue requirement matters, the Commission next determines SNGMo's return. The values for capital structure, the cost of debt, and the cost of equity remain in dispute.

¹⁴⁰ *State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n*, 537 S.W.2d 388, 392 (Mo. 1976).

¹⁴¹ *Reinhold v. Fee Fee Trunk Sewer, Inc.*, 664 S.W.2d 599, 603 (Mo. App., E.D. 1984) (citations omitted).

¹⁴² 4 CSR 240.40-040(5).

¹⁴³ EFIS No. 253, *SNGMo's Initial Brief*, filed on September 16, 2014. page 31, first full paragraph.

¹⁴⁴ 4 CSR 240-40.015.

¹⁴⁵ Section 396.390, RSMo 2000.

Findings of Fact

1. SNGMo finances its capital assets with permanent financing.¹⁴⁶ Permanent financing means common equity, long-term debt, or preferred stock.¹⁴⁷ Preferred stock is absent from SNGMo's capital structure,¹⁴⁸ so SNGMo's capital components are common equity ("equity") and long-term debt ("debt").

2. Returns are a percentage of rate base ("rate of return").

3. Multiplying the cost of each capital component (debt and equity) by its respective proportion in the capital structure, and adding the two products together, yields a weighted cost of capital,¹⁴⁹ which equals the rate of return.

4. Stated another way, cost-of-service rate-making considers SNGMo's rate of return to be its weighted cost of capital, which is as follows.

100% Capitalization	=	Debt %	x Return on Debt	= Cost of Debt	=	Weighted Cost of Capital (Rate of return)
		Equity %	x Return on Equity	= Cost of Equity		

Hence, SNGMo's returns depend on the Commission's rulings on values related to capital components.

Discussion and Conclusions of Law

The parties' arguments and the Commission's rulings on the rate of return and its components are as follows. As to the rate of return, using the parties' midpoint for return on equity:

Staff	Commission	SNGMo
7.34	7.53	8.22

As to the ratio of debt to equity:

	Staff	Commission	SNGMo
Debt	60	43	43
Equity	40	57	57

As to the cost of debt

Staff	Commission	SNGMo
5.37	3.21	3.21

As to the cost of equity:

Staff			Commission	SNGMo		
Low	Midpoint	High	10.80	Low	Midpoint	High
9.80	10.30	10.80		12.00	15.00	17.60

Therefore, SNGMo's rate of return shall be:

¹⁴⁶ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 7.

¹⁴⁷ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 7.

¹⁴⁸ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 7.

¹⁴⁹ EFIS No. 184, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 6.

100%		43 %	X 3.21	= 1.38	=	7.54
Capitalization	=	57 %	x 10.80	= 6.16		

The support for each of those rulings is as follows.

i. Capital Structure

The Commission is setting SNGMo's capital structure at 43 percent debt and 57 percent equity as SNGMo asks, because that is how SNGMo actually provided service during the test year. Staff and OPC argue for 60 percent debt and 40 percent equity.

	Staff	Commission	SNGMo
Debt	60	43	43
Equity	40	57	57

The evidence and arguments of Staff and OPC are less persuasive.

Findings of Fact

1. In 2009, the debt-to-equity ratio of SNGMo, then known as Missouri Gas Utilities, Inc., peaked at 57% debt and 43% equity.

2. On October 3, 2011, SNGMo and Southern Missouri filed an application in File No. GO-2012-0102 ("the 2011 finance case").¹⁵⁰ That application sought authorization to issue debt secured by the assets of SNGMo and Southern Missouri.¹⁵¹ The purpose of the new debt was to consolidate current debt.¹⁵² The application included a projected capital structure for 2014.¹⁵³

3. In the test year,¹⁵⁴ and at the end of 2013,¹⁵⁵ SNGMo had 43% debt and 57% equity. Debt and equity are the relationship of SNGMo to another entity in return for SNGMo's use of those other entity's resources. Debt is the resources lent to SNGMo in return for SNGMo's repayment with interest. Equity means resources invested in SNGMo in return for ownership of SNGMo and the possibility of dividends paid from SNGMo.

4. Equity is more expensive than debt,¹⁵⁶ and pays owners, so a capital structure with more equity favors owners over other persons. The owner of SNGMo, Summit Utilities, has never received any dividend from SNGMo.¹⁵⁷

¹⁵⁰ File No. GO-2012-0102, *In the Matter of the Application of Missouri Gas Utility, Inc. for Authority to Issue up to and Including \$88,000,000 of Long-Term Indebtedness in one or More Tranches after the Closing of the Merger Between Missouri Gas Utility and Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas, and to, Among Other Things, Encumber the Operating Assets of the Consolidated Entity.*

¹⁵¹ File No. GO-2012-0102, EFIS No. 1, *Application and Motion for Expedited Treatment*, filed on October 3, 2011.

¹⁵² File No. GO-2012-0102, EFIS No. 8, *Order Granting Application*, issued on December 21, 2011, page 2, first paragraph.

¹⁵³ File No. GO-2012-0102, EFIS No. 1, *Application and Motion for Expedited Treatment*, filed on October 3, 2011, appendix 7 (HC).

¹⁵⁴ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 7.

¹⁵⁵ EFIS No. 163, Exh. No. 3NP/3HC, *Surrebuttal Testimony of James M. Anderson* (NP and HC), page 12.

¹⁵⁶ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 37.

¹⁵⁷ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 40.

5. Summit Utilities also owns Colorado Natural Gas. Colorado Natural Gas has a capital structure of 57 percent debt to 43 percent equity.¹⁵⁸

6. The approximate average capital structures for gas utilities, compared to the parties' proposals, are as follows.¹⁵⁹

	<i>Debt</i>	<i>Equity</i>
Missouri	50	50
United States	48	52
SNGMo	43	57
Staff	60	40

7. SNGMo's owner Summit Utilities' capital structure was 39% long-term debt and 61% common equity. Like SNGMo, Summit Utilities has no outstanding preferred stock.F159F¹⁶⁰ Summit Utilities does not provide gas service.

Discussion and Conclusions of Law

SNGMo asks the Commission to order the capital structure under which SNGMo actually operated in the test year as agreed by the parties and ordered by the Commission.¹⁶¹ In support, SNGMo notes that SNGMo provided service to its customers under that capital structure during the test year, and no party disputes the safety and adequacy of that service. Staff argues, with OPC's support, that the Commission should depart from the test year capital structure in favor of a hypothetical capital structure. The arguments of Staff and OPC are less persuasive than SNGMo's argument.

Staff and OPC argue that using a hypothetical capital structure is necessary to protect customers from financing SNGMo's shortfall and excess capacity. To provide that protection, Staff proffers the projected capital structure from the 2011 finance case.¹⁶² Staff argues that adjusting the projected capital structure into a hypothetical capital structure¹⁶³ shows how SNGMo would look if it had not expanded into service area Lake of the Ozarks.

In support of a hypothetical capital structure, Staff cites State ex rel. Associated Natural Gas v. Public Service Commission.¹⁶⁴ In that opinion, the Court of Appeals described the permissible use of hypothetical capital structures as a furtherance of the public interest and gave two specific examples.

. . . . It appears to be an accepted regulatory practice to disregard the actual book capital structure of a utility when it is deemed to be in the public interest to do so. There are two circumstances in which a utility commission might disregard a

¹⁵⁸ EFIS No. 163, Exh. No. 3NP/3HC, *Surrebuttal Testimony of James M. Anderson* (NP and HC), page 13.

¹⁵⁹ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 44.

¹⁶⁰ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 8.

¹⁶¹ EFIS No. 15, *Order Determining Test Year, Update, and True-up*, issued on January 23, 2014.

¹⁶² File No. GO-2012-0102, *In the Matter of the Application of Missouri Gas Utility, Inc. for Authority to Issue up to and Including \$88,000,000 of Long-Term Indebtedness in one or More Tranches after the Closing of the Merger Between Missouri Gas Utility and Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas, and to, Among Other Things, Encumber the Operating Assets of the Consolidated Entity*.

¹⁶³ EFIS No. 199, Exh. No. 118, *Rebuttal Testimony of David Murray*, page 11-12.

¹⁶⁴ 706 S.W.2d 870 (Mo. App., W.D. 1985).

utility's actual capital structure and adopt a hypothetical capital structure for ratemaking purposes.

The first occurs when the utility's actual debt-equity ratio is deemed inefficient and unreasonable because it contains too much equity and not enough debt, necessitating an inflated rate of return [.]

The second circumstance that justifies adopting a hypothetical construct occurs when the utility is part of a holding company system. In such situations, the utility's book capital structure and capital costs may not be a true reflection of the system's capital costs with respect to a particular operating company. [¹⁶⁵]

Neither of those two specific situations have support in the evidence or argument of Staff and OPC. And SNGMo argues that Associated Natural Gas limits using a hypothetical capital structure on any facts other than the two specific examples. That argument requires no resolution because the Commission is not using a hypothetical capital structure in this case.

Staff incorrectly characterizes the 2011 financing case. Staff alleges that SNGMo's purpose in the 2011 finance case was to achieve a capital structure of 40 percent debt to 60 percent equity and to finance its risky expansion into service area Lake of the Ozarks. But, as SNGMo notes, the 2011 financing case's purpose was not to determine rates.

On the contrary, the Commission's decision expressly stated:

Nothing in the Commission's order shall be considered a finding by the Commission of the value of this transaction for ratemaking purposes, which includes, but is not limited to the capital structure, and that the Commission reserves the right to consider the ratemaking treatment to be afforded these financing transactions and their results in cost of capital, in any later proceeding. [¹⁶⁶]

¹⁶⁵ State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n of Missouri, 706 S.W.2d 870, 878-79 (Mo. App., W.D. 1985) citations omitted.

¹⁶⁶ File No. GO-2012-0102, EFIS No. 8, *Order Granting Application*, issued on December 21, 2011, page 3, ordered paragraph 1.A.

That ordered paragraph stands on the application's allegation¹⁶⁷ and the Commission's finding,¹⁶⁸ that the 2011 financing case's purpose was to "replace the various forms of existing debt held separately by Missouri Gas Utilities, Inc. and Southern Missouri with a single, long-term form of permanent financing." Nothing in the 2011 financing case requires Staff's hypothetical capital structure.

Also, Staff's premise for their position is that SNGMo's decision to expand in the service area Lake of the Ozarks equals the difference between the 2011 finance case's projections and the test year of 2013. The record does not support that assumption. Staff's premise is, and its conclusion therefore must be, speculative.

Staff provides no evidence of any gas utility with the capital structure that it proposes for SNGMo.¹⁶⁹ Staff refers to the capital structure of Colorado Natural Gas, but nothing shows that Colorado Natural Gas resembles SNGMo specifically in anything but common ownership. Nothing shows that common ownership is significant as to capital structure, or that Colorado Natural Gas is representative of gas service in general. On the contrary, the evidence shows that the average capitalization for Missouri natural gas utilities is approximately 50:50, and the industry average is only slightly less leveraged at 48:52 debt-to-equity.

Staff also refers to a hypothetical capital structure for SNGMo's parent Summit Utilities, developed by Infrastructure Investment Fund's auditor.¹⁷⁰ The auditor used that hypothetical capital structure to determine the fair value of Infrastructure Investment Fund's equity in Summit Utilities.¹⁷¹ The purpose and context of that value do not appear in the record. In any event, Staff does not explain the relevance of a hypothetical capital structure for Summit Utilities to a hypothetical capital structure for SNGMo.

SNGMo has shown the capital structure under which it actually operated. The desire of Staff and OPC to protect customers from speculative projects is appropriately motivated. But a hypothetical capital structure as Staff and OPC propose is not the means to that end.

Just and reasonable rates protect customers from risky conduct, because that conduct is not within the customers' control, and customers do not profit if the risk is successful. Owners have control over that conduct and profit if the risk is successful. Therefore, owners should bear the loss if the risk is unsuccessful.

Therefore, SNGMo shall file compliance tariffs that set SNGMo's capital structure at 43 percent debt and 57 percent equity.

ii. Cost of Debt

The Commission is setting SNGMo's cost of debt at SNGMo's proposed 3.21 percent per year, which is what SNGMo paid in the test year. Staff proposes a hypothetical cost of debt based in part on its hypothetical capital structure and in part on the cost of debt for Colorado Natural Gas.

Staff	Commission	SNGMo
5.37	3.21	3.21

Staff's argument is less persuasive than SNGMo's.

¹⁶⁷ File No. GO-2012-0102, EFIS No. 1, *Application and Motion for Expedited Treatment*, filed on October 3, 2011, page 3, paragraph 8; page 6, paragraph 14.

¹⁶⁸ File No. GO-2012-0102, EFIS No. 8, *Order Granting Application*, issued on December 21, 2011, page 2, first paragraph.

¹⁶⁹ EFIS No. 158, *Transcript, Volume 10*, filed on August 29, 2014, page 172, line 2-20.

¹⁷⁰ EFIS No. 211, Exh. No. 130, *Surrebuttal Testimony of David Murray*, page 7-8.

¹⁷¹ EFIS No. 211, Exh. No. 130, *Surrebuttal Testimony of David Murray*, page 7-8.

Findings of Fact

1. SNGMo has \$100 million of long-term debt outstanding, all of it due on December 31, 2015,¹⁷² at a rate of 3.21 percent¹⁷³ variable¹⁷⁴ during the test year. That amount of debt is low for a utility, and very short-term.¹⁷⁵

2. If SNGMo had a credit rating from Bloomberg Finance, L.P. ("Bloomberg"), SNGMo's credit rating would be 'B.'¹⁷⁶ Bloomberg's B-rated debt paid 7.60 percent in December 2013.¹⁷⁷ Bloomberg's BB-rated debt paid 7.35 percent.

3. Colorado Natural Gas cost of debt is 5.37 percent, variable. That interest rate was set more than two years ago. The terms of that debt allocate to Colorado Natural Gas certain extra risks that a lender ordinarily assumes. Those facts make Colorado Natural Gas cost of debt lower than it otherwise would be.

4. If SNGMo's capital structure were the same as Colorado Natural Gas, SNGMo's cost of 20-year debt would have to be from 6.5 percent to 7 percent.¹⁷⁸ That cost of debt would require a rate increase greater than a 3.21 cost of debt does.

5. Colorado Natural Gas also differs significantly from SNGMo in other ways. Compared to SNGMo, Colorado Natural Gas has 16 percent more customers, 40 percent less debt, and 47 percent higher earnings before interest, tax, depreciation, and amortization even counting earnings from the service area Lake of the Ozarks.¹⁷⁹

Discussion and Conclusions of Law

SNGMo argues for the cost of debt under which SNGMo actually functioned in the test year: 3.21 percent annual rate. SNGMo's actual paid rate in the test year, where all other data comes from, is persuasive. The hypothetical cost of debt that Staff offers—5.0 percent annually—based on Staff's hypothetical capital structure is not persuasive.

Staff argues that determining SNGMo's cost of debt according to its current capital structure is inappropriate because that capital structure is temporary. But the Commission has already favored SNGMo's capital structure. Staff argues that SNGMo's test-year 3.21 percent annual rate is too low because it is a variable rate. But so is long-term debt of Colorado Natural Gas, Staff's chosen proxy.

Staff argues that Colorado Natural Gas constitutes a reasonable proxy for what SNGMo would look like if SNGMo had not expanded into the service area Lake of the Ozarks. The Commission concludes that Colorado Natural Gas is not a reasonable proxy for SNGMo because of the significant differences in customer base, earnings, debt, terms of debt, and capital structure.

On this record, the Commission concludes that the cost of SNGMo's long-term debt should be 3.21 percent. Therefore, SNGMo shall file compliance tariffs that set SNGMo's cost of long-term debt at 3.21% per year.

¹⁷² EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 38.

¹⁷³ EFIS No. 158, *Transcript, Volume 10*, filed on August 29, 2014, page 115, line 18-20.

¹⁷⁴ EFIS No. 184, Exh. No. 104, *Staff Report Cost of Service*, page 17.

¹⁷⁵ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 38.

¹⁷⁶ EFIS No. 163, Exh. No. 3NP/3HC, *Surrebuttal Testimony of James M. Anderson* (NP and HC), page 11.

¹⁷⁷ EFIS No. 163, Exh. No. 3NP/3HC, *Surrebuttal Testimony of James M. Anderson* (NP and HC), page 11.

¹⁷⁸ EFIS No. 163, Exh. No. 3NP/3HC, *Surrebuttal Testimony of James M. Anderson* (NP and HC), page 15-16.

¹⁷⁹ EFIS No. 162, Exh. No. 2, *Rebuttal Testimony of James M. Anderson*, page 4.

iii. Return on Equity

The parties offer a range of returns on equity, and the Commission's determination is as follows.

Staff			Commission	SNGMo		
Low	Midpoint	High	10.80	Low	Midpoint	High
9.80	10.30	10.80		12.00	15.00	17.60

The recommendation of SNGMo's expert is 15.00 percent,¹⁸⁰ but SNGMo confines its request to 12.00 percent.¹⁸¹ Even so, SNGMo's evidence is less persuasive than Staff's as discussed below.

Findings of Fact

1. To calculate the appropriate return on equity for a regulated gas company, the ordinary method is to project returns on equity from other companies ("proxies") by formulas in which the variables are economic and financial information.¹⁸² Using several different formulas checks the reasonableness of the result.

a. The Proxy Group

2. Better documented information about a proxy, and closer resemblance between the proxy and the subject company, make for a better projection.

3. Standard qualifications for a regulated gas company's proxy include entities having:

- a. Stock publicly traded;
- b. At least 65 percent operating income from distribution;
- c. At least 65 percent of assets are distribution assets;
- d. Two analysts for long-term projected EPS growth available within the last 90 days;
- e. Positive historical 5-year compound annual growth rate in dividends per share; and
- f. At least investment grade credit rating.¹⁸³

4. The following entities ("proxy group") have those qualifications.¹⁸⁴

- a. AGL Resources
- b. Atmos Energy Corp.
- c. Laclede Group, Inc.
- d. New Jersey Resources
- e. Northwest Natural Gas
- f. Piedmont Natural Gas
- g. Southwest Gas Corp.
- h. WGL Holdings, Inc.

¹⁸⁰ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 42-47.

¹⁸¹ EFIS No. 164, Exh. No. 4, *Direct Testimony of Michelle A. Moorman*, page 14.

¹⁸² EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 36.

¹⁸³ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 22.

¹⁸⁴ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 22.

All entities in the proxy group have a credit rating of “A”.¹⁸⁵ The difference between the bonds of the proxy group and the bonds of SNGMo is two percent.¹⁸⁶

5. The following entities (“non-proxy group”) do not have those qualifications.

- a. NiSource. During calendar year 2013, NiSource only derived 38.95 percent of its operating income from its gas distribution operations.¹⁸⁷
- b. UGI's gas distribution operations only contributed 23.64 percent to the total operating income, while its AmeriGas Propane operations contributed 47.46 percent to its total operating income.¹⁸⁸
- c. South Jersey Industries lacked at least two analyst reports for long-term projected EPS growth within the last 90 days.¹⁸⁹

b. Constant Growth DCF

6. Experts use several methods for determining the return on equity for a regulated gas company. Constant Growth Discounted Cash Flow (“Constant Growth DCF”) is the best for a mature industry like gas service, and others are useful to check the result.

7. Constant Growth DCF determines return on equity by the following formula.

$$k = D/P_0 + g$$

where k is the cost of equity; D is the expected next 12 months dividend; P_0 is the current price of the stock; and g is the dividend growth rate. The term D/P_0 , the expected next 12 months dividend divided by current share price, is the dividend yield.

8. Historically, gas companies grow at approximately four percent, but more recent growth factors have reached five percent. Using those growth factors, and a projected average dividend yield of 3.80 percent, unadjusted for quarterly compounding, yields returns on equity of 7.8 to 8.8.

c. CAPM

9. The Capital Asset Pricing Method (“CAPM”) assumes that returns follow risk. The pure time value of money is a risk-free investment. The market as a whole has risk (“market risk”). Therefore, the reward for investing in the market is the difference between a risk-free investment and market risk. Market risk compared to the risk of a specific asset is β , the divergence of the asset from the market.

10. CAPM determines return on equity by the following formula:

$$k = R_f + \beta(R_m - R_f)$$

where k is the expected return on equity, R_f is a risk-free rate, and R_m is market risk.

11. The proxy group has a β of 0.80.¹⁹⁰ The difference in returns between stocks and bonds shows the market risk premium: calculated arithmetically, 4.64; calculated

¹⁸⁵ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 36.

¹⁸⁶ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 36.

¹⁸⁷ EFIS No. 199, Exh. No. 118, *Rebuttal Testimony of David Murray*, page 12.

¹⁸⁸ EFIS No. 199, Exh. No. 118, *Rebuttal Testimony of David Murray*, page 12.

¹⁸⁹ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 36.

¹⁹⁰ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 36.

geometrically, 6.20.¹⁹¹ Using those market risk premiums and a risk-free rate of 3.60¹⁹² yields a return on equity of 7.31 to 8.55¹⁹³ for the proxy group.

d . Total Return

12.Total Return uses historical price with dividends reinvested over time. Employing the period December 31, 2007, through October 15, 2013, and a 4.4 percent risk premium yields a return on equity of 12.5 percent for the proxy group and the entities and the non-proxy group.

Discussion and Conclusions of Law

When serving impoverished or remote areas of Missouri, financial risk and social value are inextricably bound together. OPC alleges that SNGMo is using its return on equity proposal to raise rates as a conduit to compensate for its shortfall and the Commission should not reward SNGMo for overbuilding. But the Commission has already addressed the issue of excess capacity in each service area.

SNGMo's evidence for return on equity is less credible than Staff's. The reasons include without limitation the following. SNGMo's witness for return on equity is not a shareholder,¹⁹⁴ but is also not an outside expert. SNGMo's expert has a long history of interests related to SNGMo and its owners, including the sale of securities among those entities,¹⁹⁵ and past seats on boards of directors, and current alternate status on boards of directors,¹⁹⁶ when SNGMo's projections led to the unfulfilled aspirations at the heart of this litigation.

Also, SNGMo bases its estimate for return on equity in part on the non-proxy group.¹⁹⁷ The growth factor employed is unrealistically high. Even if one disregards the increased rate shock, and disregards the possibility of risk-shifting, one cannot disregard SNGMo's decision to distance itself from its own expert's range.¹⁹⁸ Altogether, the Commission accords that range less weight in constructing safe and adequate service at just and reasonable rates.

Staff's results are more convincing because Staff's standards for admittance into the proxy group are higher, and Staff's analyses are more thorough as to growth in Constant Growth DCF and market risk premium in CAPM. Therefore, the Commission will choose a value from Staff's range.

¹⁹¹ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 32-33.

¹⁹² EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 32.

¹⁹³ EFIS No. 185, Exh. No. 104, *Staff Report Revenue Requirement Cost of Service*, page 33.

¹⁹⁴ EFIS No. 158, *Transcript, Volume 10*, filed on August 29, 2014, page 140, line 7.

¹⁹⁵ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 6.

¹⁹⁶ EFIS No. 158, *Transcript, Volume 10*, filed on August 29, 2014, page 139, line 18, to page 140, line 5-7.

¹⁹⁷ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 44.

¹⁹⁸ EFIS No. 164, Exh. No. 4, *Direct Testimony of Michelle A. Moorman*, page 14.

Staff's range includes a risk factor of 2 percent. The Commission concludes that a risk factor is due. Staff's risk factor stands on the difference between SNGMo's bond rating and the bond rating of the proxy group. SNGMo disputes Staff's bond analysis but Staff's risk analysis inspires more confidence than SNGMo's. SNGMo offers a set of risk factors, totaling 4.4 percent, without evidence that experts—or anyone other than SNGMo's expert—ordinarily uses them.¹⁹⁹ The Commission also considers SNGMo's place in the debt market, and the need to keep SNGMo a worthwhile investment for its sole shareholder. The Commission further considers the social value of bringing gas service to parts of Missouri where it has not before been available. Those considerations move the Commission's determination to the high end of Staff's range, which is 10.80 percent.

OPC cites a rule of reasonableness that checks the reasonableness of a decision by comparison with other decisions. But the other decisions that OPC cites are from other States.²⁰⁰ Those citations are less persuasive than past Commission decisions because, not only has OPC shown nothing about the controlling facts in those decisions, OPC has shown nothing about the controlling law. OPC has not shown that the cited decisions are comparable.²⁰¹

Therefore, the Commission will order SNGMo to file compliance tariffs setting the maximum allowable return on equity at 10.80 percent.

D. Rate Design: Phase-In

Rate design is the manner in which SNGMo collects its revenue requirement: how much, from whom, and when. The last is in dispute: whether tariffs should mitigate rate shock by gradually phasing in a rate increase. The Commission is not ordering a phase-in of rates because no party offers a proposal that will support safe and adequate service at just and reasonable rates.

Findings of Fact

1. Members of MSBA formerly served by Southern Missouri ("the schools") are within SNGMo's service area. The schools are special transportation customers—they do not buy gas at retail from SNGMo, but pay SNGMo to deliver the gas that the schools buy from other retail sellers, both under a statutorily authorized aggregation program.²⁰²

2. SNGMo's transportation customers send SNGMo an order for the amount of gas it will use in a coming month ("nomination"). If the nomination is too high, SNGMo has overbought. If the nomination is too low, SNGMo must supply more gas. The schools retain a pool operator to manage their nominations.²⁰³

3. Until January 1, 2014, the schools received a 10.77 percent discount on transportation services ("flex rate"). The flex rate represented transportation below cost.²⁰⁴

¹⁹⁹ EFIS No. 161, Exh. No. 1, *Direct Testimony of James M. Anderson*, page 52.

²⁰⁰ EFIS No. 271, *Public Counsel's Reply Regarding Return on Equity*, filed on October 23, 2014, page 2-3.

²⁰¹ The decisions are not in the record and OPC offers no authority under which Commission can take notice of those decisions. Similarly, Staff's initial brief cites documents outside of the record in support of its argument on cost-of-service rate-making theory. The Commission has not relied on those documents.

²⁰² EFIS No. 208, Exh. No. 127, *Surrebuttal Testimony of Phil Lock*, page 2

²⁰³ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 349, line 7-25.

²⁰⁴ EFIS No. 208, Exh. No. 127, *Surrebuttal Testimony of Phil Lock*, page 2.

4. For deviations from the monthly nomination, SNGMo currently bills the schools under a balancing charge, the price of unused gas or extra gas needed, which rolls over as a credit or debit to the next month. Under the tariffs, the balancing charge will change to a cash-out due each month without rollover. The cash-out will include an amount (“cash price determinant”) that increases with the inaccuracy of the nomination and will be as high as 20 percent if the schools’ nomination is off by 15 percent, but is zero if the nomination is within five percent.²⁰⁵

Discussion and Conclusions of Law

MSBA asks the Commission to reduce rate shock by phasing in all or some of the rate increase gradually, and OPC agrees. This is a matter of rate design because it determines when SNGMo collects its new rates. Those rates will stand on SNGMo’s cost of service with a return as constitutionally required so a delay in collecting those rates requires compensation.

As authority for a phase-in, MSBA cites a statute that addresses phasing in rates for electrical corporations:

If, after hearing, the commission determines that any **electrical corporation** should be allowed a total increase in revenue that is primarily due to an **unusually large increase in the corporation's rate base**, the commission, in its discretion, need not allow the full amount of such increase to take effect at one time, but may instead phase in such increase over a reasonable number of years.²⁰⁶

Assuming that such law supports a phase-in for any entity other than an electric company, MSBA does not allege an unusually large increase in rate base. In fact, as discussed above under Excess Capacity, the Commission is reducing rate base.

MSBA cites the cash-out, but those arguments are inaccurate or unpersuasive for several reasons. Foremost, MSBA asked for the cash-out. The cash-out is a matter settled²⁰⁷ with express and detailed tariff language²⁰⁸ agreed to by MSBA.²⁰⁹ Also, MSBA alleges that the cash-out price determinant will cost the schools 20 percent per year more than the balancing charge carry-over does, but the supporting testimony of MSBA’s expert witness on that point is speculative at best,²¹⁰ because it assumes that the cash determinant will be 20 percent every month.²¹¹ On the contrary, the schools control their nominations through a pool operator²¹² and, if the nomination is within five percent, it incurs a cash-out determinant of zero.²¹³

²⁰⁵ EFIS No. 149, *Partial Stipulation and Agreement*, filed August 18, 2014, page 4-5, paragraph 5.b.ii.

²⁰⁶ Section 393.155.1, RSMo 2000 (emphasis added).

²⁰⁷ EFIS No. 149, *Partial Stipulation and Agreement*, filed August 18, 2014.

²⁰⁸ EFIS No. 149, *Partial Stipulation and Agreement*, filed August 18, 2014, page 4-5, paragraph 5.b.ii.

²⁰⁹ EFIS No. 149, *Partial Stipulation and Agreement*, filed August 18, 2014, page 10, lower left signature block.

²¹⁰ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 370, line 20 to page 376, line 2.

²¹¹ EFIS No. 240, Exh. No. 404.

²¹² EFIS No. 159, *Transcript, volume 12*, filed on August 29, 2014, page 349, line 7-25.

²¹³ EFIS No. 149, *Partial Stipulation and Agreement*, filed August 18, 2014, page 4-5, paragraph 5.b.ii.

MSBA cites increases in the schools' costs for retail gas and transportation that are outside the Commission's jurisdiction or authority. Specifically, the statutes allow the schools to aggregate their purchases for retail gas like large industrial or commercial basic transportation customers:²¹⁴ for gas at retail on the open market and interstate for transportation regulated by the United States Federal Energy Regulatory Commission.²¹⁵ SNGMo's price for transportation to the schools is all that the Commission regulates.²¹⁶ And that regulation is further restricted by statutory requirements that the tariffs must not have any negative financial impact on SNGMo, SNGMo's customers, or local taxing authorities.²¹⁷

MSBA cites the loss of the flex rate. The end of the flex rate means only that the schools pay the cost of serving them. That result is in accord with cost-of-service rate making. MPGA urges rates at the cost of service. MSBA does not advocate any other result.²¹⁸

Also related to the cost of service, MSBA offers no support on a crucial condition of the statute that MSBA cites:

Any such phase-in **shall allow** the electrical corporation to recover **the revenue which would have been allowed in the absence of a phase-in** and shall make **a just and reasonable adjustment thereto to reflect the fact that recovery of a part of such revenue is deferred to future years**. In order to implement the phase-in, the commission may, in its discretion, approve tariff schedules which will take effect from time to time after the phase-in is initially approved.²¹⁹

The emphasized language expresses the General Assembly's understanding that just and reasonable rates deferred are no longer just and reasonable. To bring those rates back within constitutional standards, the Commission must provide an "adjustment" for deferral. The adjustment typically takes the form of a carrying cost, an amount to compensate SNGMo for the added expense during the deferral.²²⁰ An adjustment must address those factors and the "reasonable number of years" that it shall last.

On those elements, MSBA and OPC offer no evidence. The most detailed suggestion is OPC's argument that a phase-in should occur somewhere between more than "a single year"²²¹ and "over a number of years."²²² Moreover, even if the Commission were inclined to construct a phase-in program for MSBA and OPC, there is no evidence that a phase-in would lessen the real hardship. Thus, MSBA and OPC have not shown that phased-in rates alleviate rate shock—MSBA's primary theme—because the adjustment for deferral is always at the customer's expense.

Therefore, SNGMo shall file compliance tariffs that do not phase in any rate increase.

²¹⁴ Section 393.310, RSMo Supp. 2013.

²¹⁵ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 355, lines 3 to 15.

²¹⁶ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 355, lines 3 to 15.

²¹⁷ Section 393.310.5 and 6, RSMo Supp. 2013.

²¹⁸ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 352, line 25-page 353, line 6 .

²¹⁹ Section 393.155.1, RSMo 2000 (emphasis added).

²²⁰ EFIS No. 159, *Transcript, Volume 12*, filed on August 29, 2014, page 347, line 7-23.

²²¹ EFIS No. 255, *Initial Brief of the Office of the Public Counsel*, filed on September 16, 2014, page 30.

²²² EFIS No. 258, *Reply Brief of the Office of the Public Counsel*, filed on September 26, 2014, page 16.

IV. Rulings

For those reasons, the Commission rules as follows.

THE COMMISSION ORDERS THAT:

1. The tariff sheets assigned Tracking No. YG-2014-0285 are rejected. The specific tariff sheets rejected are set forth in the Appendix.
2. Summit Natural Gas of Missouri, Inc., shall file new tariff sheets in compliance with this report and order.
3. This report and order shall be effective on November 28, 2014.

R. Kenney, Chm., Stoll, W. Kenney, and
Hall, and Rupp, CC., concur;
and certify compliance with
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 29th day of October, 2014.

Appendix: Tariff Sheets Rejected

The tariff sheets rejected are:

<u>P.S.C. MO. No. 3</u>		
Original Sheet No. 1	Cancelling	P.S.C. MO No. 1 6th revised Sheet No. 1
Original Sheet No. 2	Cancelling	P.S.C. MO No. 1 4th revised Sheet No. 2
Original Sheet No. 3	Cancelling	P.S.C. MO No. 1 4th revised Sheet No. 3
Original Sheet No. 3A	Cancelling	P.S.C. MO No. 1 5th revised Sheet No. 3A
Original Sheet No. 3B	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 3B
Original Sheet No. 3C	Cancelling	P.S.C. MO No. 2 2nd revised Sheet No. v
Original Sheet No. 3D	Cancelling	P.S.C. MO No. 2 Original Sheet No. v.1
Original Sheet No. 4	Cancelling	P.S.C. MO No. 1 5th revised Sheet No. 4
Original Sheet No. 4A	Cancelling	P.S.C. MO No. 1 6th revised Sheet 4A
Original Sheet No. 4B	Cancelling	P.S.C. MO No. 1 Original Sheet No. 4D
Original Sheet No. 4C	Cancelling	P.S.C. MO No. 1 Original Sheet No. 4E
Original Sheet No. 4D	Cancelling	P.S.C. MO No. 2 Original Sheet No. vi
Original Sheet No. 4E	Cancelling	P.S.C. MO No. 2 1st revised Sheet No. vii
Original Sheet No. 4F	Cancelling	P.S.C. MO No. 2 1st revised Sheet No. viii
Original Sheet No. 4G	Cancelling	P.S.C. MO No. 2 Original Sheet No. ix
Original Sheet No. 4H	Cancelling	P.S.C. MO No. 2 2nd revised Sheet No. x
Original Sheet No. 4I	Cancelling	P.S.C. MO No. 2 Original Sheet No. xiii
Original Sheet No. 4J	Cancelling	P.S.C. MO No. 2 Original Sheet No. xi
Original Sheet No. 4K	Cancelling	P.S.C. MO No. 2 Original Sheet No. xii
Original Sheet No. 5	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 5
Original Sheet No. 6	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 6
Original Sheet No. 7	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 7
Original Sheet No. 8	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 10
Original Sheet No. 9	Cancelling	P.S.C. MO No. 1 4th revised Sheet No. 11
Original Sheet No. 10	Cancelling	P.S.C. MO No. 1 Original Sheet No. 11A
Original Sheet No. 11	Cancelling	P.S.C. MO No. 2 2nd revised Sheet No. 1
Original Sheet No. 12		
Original Sheet No. 13	Cancelling	P.S.C. MO No. 2 3rd Revised Sheet No. 1.1
Original Sheet No. 14		
Original Sheet No. 15	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 13
Original Sheet No. 15A	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 14
Original Sheet No. 16	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 15
Original Sheet No. 16A	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 16
Original Sheet No. 17	Cancelling	P.S.C. MO No. 1 Original Sheet No. 15A
Original Sheet No. 17A	Cancelling	P.S.C. MO No. 1 Original Sheet No. 16A
Original Sheet No. 18	Cancelling	P.S.C. MO No. 2 2nd revised Sheet No. 1.2
Original Sheet No. 19		
Original Sheet No. 20	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 17
Original Sheet No. 20A	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 18
Original Sheet No. 21	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 19
Original Sheet No. 21A	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 20
Original Sheet No. 22	Cancelling	P.S.C. MO No. 1 Original Sheet No. 19A
Original Sheet No. 22A	Cancelling	P.S.C. MO No. 1 Original Sheet No. 20A

Original Sheet No. 23	Cancelling	P.S.C. MO No. 2 2nd revised Sheet No. 2
Original Sheet No. 23A	Cancelling	P.S.C. MO No. 2 Original Sheet No. 3
Original Sheet No. 24		
Original Sheet No. 24A		
Original Sheet No. 25	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 24
Original Sheet No. 26	Cancelling	P.S.C. MO No. 1 3rd revised Sheet No. 23
Original Sheet No. 27		
Original Sheet No. 28	Cancelling	P.S.C. MO No. 2 3rd revised Sheet No. 6
Original Sheet No. 29		
Original Sheet No. 30	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 25
Original Sheet No. 31	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 26
Original Sheet No. 32	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 27
Original Sheet No. 33	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 28
Original Sheet No. 34		
Original Sheet No. 35	Cancelling	P.S.C. MO No. 1 2 nd revised Sheet No. 29
Original Sheet No. 36	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 29A
Original Sheet No. 37	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 30
Original Sheet No. 38		
Original Sheet No. 39	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 33
Original Sheet No. 39A		
Original Sheet No. 40	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 34
Original Sheet No. 41	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 35
Original Sheet No. 42	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 36
Original Sheet No. 43	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 37
Original Sheet No. 43A	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 37A
Original Sheet No. 43B	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 37B
Original Sheet No. 43C	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 37C
Original Sheet No. 44	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 38
Original Sheet No. 45	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 39
Original Sheet No. 46	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 40
Original Sheet No. 47	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 41
Original Sheet No. 48	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 42
Original Sheet No. 49	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 43
Original Sheet No. 50	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 44
Original Sheet No. 51	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 45
Original Sheet No. 52	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 46
Original Sheet No. 53	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 47
Original Sheet No. 54	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 48
Original Sheet No. 55	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 49
Original Sheet No. 56	Cancelling	P.S.C. MO No. 1 13th revised Sheet No. 51
Original Sheet No. 57	Cancelling	P.S.C. MO No. 1 7th revised Sheet No. 52
Original Sheet No. 58	Cancelling	P.S.C. MO No. 2 Original Sheet No. 27
Original Sheet No. 59	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 54
Original Sheet No. 60	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 55
Original Sheet No. 61	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 57
Original Sheet No. 62	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 58
Original Sheet No. 63	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 59
Original Sheet No. 64	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 60

Original Sheet No. 65	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 61
Original Sheet No. 66	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 62
Original Sheet No. 67	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 63
Original Sheet No. 68	Cancelling	P.S.C. MO No. 1 1st revised Sheet No. 64
Original Sheet No. 69	Cancelling	P.S.C. MO No. 1 2nd revised Sheet No. 65
Original Sheet No. 70	Cancelling	P.S.C. MO No. 1 Original Sheet No. 65A
Original Sheet No. 71	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 66
Original Sheet No. 72	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 67
Original Sheet No. 73	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 68
Original Sheet No. 74	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 69
Original Sheet No. 75	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 70
Original Sheet No. 76	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 71
Original Sheet No. 77	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 72
Original Sheet No. 78	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 73
Original Sheet No. 79	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 74
Original Sheet No. 80	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 75
Original Sheet No. 81	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 76
Original Sheet No. 82	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 78
Original Sheet No. 83	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 79
Original Sheet No. 84	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 81
Original Sheet No. 85	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 83
Original Sheet No. 86	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 84
Original Sheet No. 87	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 85
Original Sheet No. 88	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 86
Original Sheet No. 89	Cancelling	P.S.C. MO No. 1 1st Revised Sheet No. 87

Appendix: Appearances

For:

Summit Natural Gas of Missouri, Inc.:

Dean L. Cooper, Attorney at Law

Diana C. Carter, Attorney at Law

Paul A. Boudreau, Attorney at Law

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Missouri Division of Energy:

Jeremy D. Knee, Associate General Counsel

Department of Economic Development

301 West High Street

Jefferson City, Missouri 65102

Daniel Jordan, Senior Regulatory Law Judge.

In the Matter of Missouri-American Water Company)	
for a Certificate of Convenience and Necessity)	
Authorizing It to Install, Own, Acquire, Construct,	)	<u>File No. WA-2015-0019</u>
Operate, Control, Manage and Maintain Water and)	
Sewer Systems in Lincoln County, Missouri)	

WATER. §2. Certificate of convenience and necessity. When a water company bought an unregulated entity, the Commission granted the water company's application for a certificate of convenience and necessity to serve the area formerly served by the unregulated entity, subject to conditions related to tariffs, depreciation, records, service calls, meter-reading, and billing.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: November 5, 2014

Effective Date: December 5, 2014

On July 21, 2014, Missouri American Water Company (MAWC) filed an application with the Missouri Public Service Commission requesting authority to own and operate a water and sewer system in Lincoln County, Missouri. In its application, MAWC informs the Commission that it will purchase the water and sewer systems from Anna Meadows Homeowner's Association, Inc. The association is not regulated by the Commission. However, after the purchase, MAWC and the water and sewer systems will be subject to the Commission's jurisdiction.

The Commission issued notice of the application and there were no requests to intervene. Staff filed its Recommendation to conditionally approve the application. Both the company and the Office of the Public Counsel agree with Staff's recommended approval.

Staff's Recommendation

Staff informs the Commission that Anna Meadows is a rural residential subdivision located south of Moscow Mills, Missouri in Lincoln County. The subdivision has 175 lots. As of August 20, 2014, there were 67 occupied homes and 13 homes under construction. Staff states that the water and sewer systems have the capacity to serve 175 homes and are not part of any other water or sewer system. Currently, the sewer and unmetered water rates are each \$35/month and will be in effect until the MAWC's next rate case. Staff also notes that the proposed service area is larger than the subdivision, is consistent with the service areas described in Attachments A and B to Staff's Recommendation, and is reasonable.

Staff recommends that the Commission approve the application and require or authorize MAWC to comply with certain conditions. Those requirements and authorizations are set out in the ordered paragraphs below.

Discussion

The Commission may grant a certificate of convenience and necessity upon a determination that such grant of authority is “necessary or convenient for the public service.”¹ The Commission has relied on the following criteria in making this determination:

1. There must be a need for the service;
2. The applicant must be qualified to provide the proposed service;
3. The applicant must have the financial ability to provide the service;
4. The applicant’s proposal must be economically feasible; and
5. The service must promote the public interest.²

Based on the verified application and the verified Staff Recommendation, the Commission finds that granting the requested Certificate of Convenience and Necessity meets the above-listed criteria and is therefore necessary or convenient for the public service.

The law requires the Commission to make this determination “after due hearing.”³ There was no request for an evidentiary hearing. The requirement for a hearing is met when the opportunity is provided even though no party requests a hearing.⁴ Therefore, in this case, the Commission need not hold an evidentiary hearing to satisfy the “due hearing” requirement.

Having found that granting this certificate is necessary and convenient for the public service, the Commission will grant the requested relief. As recommended by Staff, the Commission will also direct that the conditions be met that are set out in Staff’s Recommendation.

THE COMMISSION ORDERS THAT:

1. Missouri American Water Company is granted a Certificate of Convenience and Necessity to provide water and sewer service, consistent with the service areas described in Attachments A and B to Staff Recommendation.
2. Missouri American Water Company shall to notify the Commission of the closing of the assets within 5 days of such closing.
3. If closing does not occur within 30 days, Missouri American Water Company shall file a status report within 5 days thereafter and every 30 days thereafter until closing or until the company determines that closing will not occur.
4. Missouri American Water Company is authorized to submit new tariff sheets, within 30 days of the effective date of this order, as 30-days filings, for its existing water tariff No. 13 depicting the Anna Meadows service area with a written description that is consistent with that shown by Attachment A to Staff’s Recommendation, a map consistent with that as shown by Attachment B to Staff’s Recommendation, a \$35 per month flat rate for water service to be specific to Anna Meadows, and miscellaneous service charges similar to miscellaneous service charges applicable to other MAWC service areas as appropriate and described in Staff’s Recommendation.

¹ Section 393.170, RSMo.

² *In re Tartan Energy Company*, 2 Mo. P.S.C. 173, 177 (1994).

³ Section 393.170.3, RSMo.

⁴ *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Missouri*, 776 S.W.2d 494 (Mo. App. W.D. 1989).

5. Missouri American Water Company is authorized to submit new tariff sheets for its existing sewer tariff No. 7, depicting the Anna Meadows service area with a written description that is consistent with that shown by Attachment A to Staff's Recommendation, a map consistent with that as shown by Attachment B to Staff's Recommendation, a \$35 per month flat rate for sewer service to be specific to Anna Meadows, and miscellaneous service charges similar to those in effect for the Warren County service area but excluding existing Capacity Charges.

6. Missouri American Water Company is authorized to utilize and apply depreciation rates as shown in Attachments D and E of Staff's Recommendation.

7. Missouri American Water Company shall keep its financial books and records for plant-in-service and operating expense in accordance with the NARUC Uniform System of Accounts.

8. Missouri American Water Company shall keep operation records; including, those for customer complaints/inquiries, meter placement and replacement/testing, vehicle, equipment and telephone use records, and customer account records.

9. Missouri American Water Company shall adhere to Commission rule 4 CSR 240-13.020(1), regarding the production of customer bills, within 30 days of the effective date of this order.

10. Missouri American Water Company shall distribute to Anna Meadows customers, prior to the first billing and consistent with 4 CSR 240-13(3), an informational brochure detailing the rights and responsibilities of the utility and its customers.

11. Missouri American Water Company shall include the Anna Meadows customers along with existing customers for its reporting to the Commission's Engineering Management Services Unit (EMSU) for: 1) Average Abandoned Call Rate; 2) Average Speed of Answer; 3) 1st Call Effectiveness; 4) Average Customer Response Time; 5) Call Volumes; 6) Call Center Staffing and Staffing Levels; 7) the number of actual monthly meter reads in total and by district; 8) the number of monthly estimated meter reads; 9) the number of consecutive estimated reads; and, 10) the meter reading staffing levels.

12. Missouri American Water Company shall provide adequate training to all customer service representatives prior to Anna Meadows customers receiving their first bill from MAWC.

13. Missouri American Water Company shall provide to the EMSU a monthly document detailing the bills to Anna Meadows customers that were issued for greater than 35 days of service.

14. Missouri American Water Company shall provide to the EMSU staff within 30 days after billing a sample of 10 billing statements of its first month bills issued to Anna Meadows customers.

15. This order shall become effective on December 5, 2014.

16. This file shall be closed on December 6, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur.

Jones, Senior Regulatory Law Judge

In the Matter of the Joint Application of West)
16th Street Sewer Company, W.P.C. Sewer)
Company, Village Water and Sewer Company,)
Inc. and Raccoon Creek Utility Operating)
Company, Inc., for Raccoon Creek to Acquire)
Certain Sewer Assets and, in Connection)
Therewith, Issue Indebtedness and Encumber)
Those Assets.)

File No. SM-2015-0014

SEWER. §2. Certificate of convenience and necessity. §4. Transfer, lease and sale. The Commission authorized one sewer company to buy another, conditioned on contracts for operation, billing, and emergency answering arrangements.

**ORDER REGARDING STIPULATION AND AGREEMENT AND
CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: November 24, 2014

Effective Date: December 24, 2014

On July 14, 2014, West 16th Street Sewer Company, W.P.C. Sewer Company, Village Water and Sewer Company, Inc., and Raccoon Creek Utility Operating Company, Inc. (collectively, "Applicants") filed an joint application with the Missouri Public Service Commission ("Commission") seeking authority for Raccoon Creek Utility Operating Company, Inc. ("Raccoon Creek") to purchase substantially all of the sewer assets of the other Applicants and to issue up to \$1,600,000 of secured indebtedness. The Commission ordered that notice of the joint application be given to the public and interested parties. The Commission did not receive any requests to intervene. On September 30, 2014, the Commission's Staff recommended that the Applicants' joint application be approved, subject to a number of conditions. At the request of the Office of the Public Counsel, a local public hearing was conducted in Sedalia, Missouri on November 19, 2014.

On November 13, 2014, Raccoon Creek and the Commission's Staff filed a Non-Unanimous Stipulation and Agreement ("Agreement"). The Commission may resolve any part of this proceeding on the basis of a stipulation and agreement. Since no party filed a timely objection to the Agreement, the Commission will treat the Agreement as a unanimous stipulation and agreement.¹ After reviewing the Agreement, the Commission independently finds and concludes that the Agreement is a reasonable resolution of the issues addressed by the Agreement and that such Agreement should be approved.

The Commission may grant a sewer corporation a certificate of convenience and necessity ("CCN") to operate after determining that the construction and operation are either "necessary or convenient for the public service."² The Commission articulated the specific criteria to be used when evaluating applications for utility CCNs in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria:

¹ Commission Rule 4 CSR 240-2.115(1)(B).

² Section 393.170.3, RSMo 2000.

(1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.³

Based on the Commission's independent and impartial review of the verified filings, the Commission determines that Raccoon Creek has satisfied all necessary criteria for the grant of the applied-for CCN. Raccoon Creek's provision of sewer service to the service area described in the joint application is in the public interest. The Commission will authorize the sale of assets, permit Raccoon Creek to incur debt, grant the request for the certificate of convenience and necessity, and approve the Agreement.

THE COMMISSION ORDERS THAT:

1. Raccoon Creek Utility Operating Company, Inc. is authorized to acquire the assets of the other Applicants identified in the joint application, and the other Applicants are authorized to sell the assets identified in the joint application.

2. Raccoon Creek Utility Operating Company, Inc. is granted a certificate of convenience and necessity to provide sewer service in the other Applicants' existing service areas, to be exercised upon closing of the respective Applicants' assets, subject to the conditions described in the Agreement.

3. Raccoon Creek Utility Operating Company, Inc. is authorized to enter into, execute and perform in accordance with the terms described in the agreement attached to the joint application and to take any and all other actions which may be reasonably necessary and incidental to the performance of the acquisition.

4. Raccoon Creek Utility Operating Company, Inc. is authorized to enter into, execute and deliver loan agreements with Fresh Start Ventures LLC to incur indebtedness.

5. Raccoon Creek Utility Operating Company, Inc. is authorized to create and make effective a first lien on all of the franchises, certificates of convenience and necessity, plant and system of Raccoon Creek, to secure its obligations under the loan.

6. Raccoon Creek Utility Operating Company, Inc. is authorized to enter into, execute, deliver and perform the necessary promissory notes, loan agreements and other documents necessary to effectuate the financing transaction.

7. Raccoon Creek Utility Operating Company, Inc. is prohibited from closing on assets or operating as a sewer utility unless it has operation, billing, and emergency answering arrangements (contracts) that can be in place and exercised immediately, respective of the assets of each of the Applicants, upon closing.

³The factors have also been referred to as the "Tartan Factors" or the "Tartan Energy Criteria." See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

8. Raccoon Creek Utility Operating Company, Inc. shall notify the Commission of closing on the assets of each of the Applicants within five (5) days after such closings.

9. West 16th Street Sewer Company, W.P.C. Sewer Company, and Village Water and Sewer Company, Inc. may cease providing service immediately after closing on the respective assets. Upon notification to the Commission of the closing, the respective Applicant's existing certificate of convenience and necessity shall be canceled.

10. The Non-Unanimous Stipulation and Agreement is approved and incorporated herein as if fully set forth. The signatories to the Agreement are ordered to comply with that Non-Unanimous Stipulation and Agreement.

11. Nothing in this order shall bind the Commission on any ratemaking issue in any future rate proceeding.

12. This order shall be effective on December 24, 2014.

R. Kenney, Chm., Stoll, W. Kenney, Hall, and Rupp, CC., concur.

Bushmann, Senior Regulatory Law Judge

NOTE: The Stipulation And Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities' Tariff Revisions Designed to Implement a General Rate Increase for Natural Gas Service in the Missouri Service Areas of the Company)
)
) **File No. GR-2014-0152**
)
)

ACCOUNTING. §25. Maintenance, repairs and depreciation. EXPENSE. §37. Depreciation. §54. Maintenance and depreciation; repairs and replacements

VALUATION. §72. Property subject to depreciation. The Commission rejected a party's proposed depreciation of computer hardware and software at 4.75% over 21 years as unreasonably long.

GAS. §18. Rates. §74. Purchases under contract. Reasonable expenses include wholesale gas prices set by the Federal Energy Regulatory Commission.

RATES. §19. Contract or franchise rate. In calculating a gas company's revenue requirement, the Commission used the special contract rate that the gas company was required to collect from specified customers in accordance with the terms of a settlement, and refused to apply rates set by tariff for other customers.

The Commission ordered the filing of a tariff to govern sales under special contracts.

REPORT AND ORDER

Issue Date: December 3, 2014

Effective Date: January 2, 2015

APPEARANCES

James M. Fischer, Esq., and **Larry W. Dority, Esq.**, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101, for Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities.

Edward F. Downey, Esq., and **Diana M. Vuyksteke, Esq.**, Bryan Cave LLP, 221 Bolivar Street, Suite 101, Jefferson City, Missouri 65109, for Noranda Aluminum, Inc.

Jeremy Knee, Esq., Associate General Counsel, Missouri Department of Economic Development, P.O. Box 1157, Jefferson City, Missouri 656102, for The Missouri Division of Energy

Marc D. Poston, Esq., Chief Deputy Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Kevin Thompson, Esq., Chief Staff Counsel, **Jeffrey A. Keevil, Esq.**, Senior Staff Counsel, and **Akayla J. Jones, Esq.**, Legal Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Ronald D. Pridgin, Deputy Chief**

Procedural History

On February 6, 2014, Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities (hereafter “Liberty”) submitted to the Commission proposed tariff sheets that are intended to implement a general rate increase for natural gas service provided in its Missouri service area. Liberty’s proposed tariffs would increase its Missouri jurisdictional revenues by approximately \$7.6 million, or by 15.9%. The Commission suspended the tariffs and issued an Order and Notice on February 7.¹

The Commission received timely intervention requests from The Missouri Division of Energy and Noranda Aluminum, Inc. The Commission granted these requests.

The test year is the 12 months ending September 30, 2013, updated for known and measureable changes through March 31. The Commission held local public hearings in Jackson, Sikeston, Hannibal, Kirksville, and Butler. The evidentiary hearing went from September 8 until September 10.

Stipulations

On August 12, Liberty, the Staff of the Commission (“Staff”), and the Office of the Public Counsel (“OPC”) filed a Partial Stipulation and Agreement as to Certain Issues. The stipulations resolved all issues except: cost of capital, depreciation, cost of removal, special contracts, ISRS, rate design, and energy efficiency and weatherization.

No parties objected. Therefore, as permitted by Commission Rule 4 CSR 240-2.115, the Commission treated the stipulation as unanimous, and approved it on August 20.

As the August 12 stipulation stated, Liberty and Staff were to jointly file a late-filed exhibit identifying the final amount of rate case expense to be included in revenue requirement. Liberty and Staff did so on November 19, offering Late-Filed Exhibit 63 into evidence. The exhibit requests a final amount of rate case expenses of \$609,679 normalized over three years at \$203,226 per year.

OPC responded on November 24, opposing Liberty and Staff’s requests. OPC characterizes the request as excessive, claiming that the stipulation provided for \$37,768 of rate case expense, and that Liberty requests an increase of \$571,911 above the agreed-upon \$37,768. Further, OPC claims Liberty’s request is conclusory, completely lacking any support.

The Commission ordered Liberty and Staff to respond to OPC’s opposition. Liberty and Staff responded on December 1.

Staff states that OPC misrepresents Liberty’s request. First, Staff points out that the rate case expense is to be normalized over three years, so the revenue requirement for the requested rate case expense is \$203,226, not \$609,679. Secondly, Staff states that the \$37,768 of additional rate case expense is in addition to the normalized amount of rate case expense already included in Staff’s direct case. Staff included rate case expense of \$51,210 in its direct case.² Thus, at the time of the August 12 stipulation, the total amount of rate case expense contemplated was \$88,978. Finally, Staff included a Highly Confidential workpaper which Staff represents it emailed to OPC before its November 19 filing.

¹ Calendar dates refer to 2014 unless otherwise noted.

² Ex. 17, p. 7.

Liberty's response largely echoes Staff's response. Liberty also states that it does not suggest OPC acquiesced to a blank check for rate case expense when it signed the August 12 stipulation. Liberty states that it provided invoices to Staff to support its claim. Further, Liberty said that it understood Staff consulted with OPC while finalizing Staff's workpaper that became the basis for Late-Filed Exhibit 63.

The August 12 stipulation provides for possible inclusion of additional rate case expense. Liberty and Staff offered Exhibit 63 in support of the additional rate case expense. And while OPC clearly opposes this request, OPC did not object to the admission of Exhibit 63.

This is significant because "in fact, all probative evidence received without objection in a contested case must be considered in administrative hearings."³ All parties waive objection to that evidence, even if they make a "specific and laborious objection" to that same evidence later in the hearing.⁴ Thus, Exhibit 63 is admitted.

Based on the information presented in Exhibit 63 and in the verified pleadings of Staff and Liberty, the Commission approves as reasonable a final amount of rate case expenses of \$609,679. The Commission also approves normalizing this amount over three years at \$203,226 per year.

On September 5, Liberty, OPC and The Missouri Division of Energy ("DE") filed a Non-Unanimous Second Partial Stipulation and Agreement as to Certain Issues. Staff did not sign this stipulation, and asked for a hearing on one of the issues from that stipulation.

On September 10, Liberty, OPC and DE withdrew the September 5 stipulation. At the same time, Liberty, OPC, DE and Staff filed a Revised Second Partial Stipulation and Agreement. Noranda did not sign it. But the signatories represented that Noranda did not object, and did not request a hearing on the issues resolved by the September 10 stipulation. As permitted by Commission Rule 4 CSR 240-2.115, the Commission will treat the stipulation as unanimous, and will approve it.

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision, and the Commission finds the rates resulting from this decision just and reasonable.

General Findings of Fact

1. Liberty began providing natural gas service in Missouri in 2012 after buying the natural gas assets of Atmos Energy Corporation. The Commission approved the sale in File No. GM-2012-0037.⁵

³ See *Dorman v. State Bd. of Registration of Healing Arts*, 64 S.W.3d 446, 454 (Mo. App. 2001); see also Section 536.070(8) ("Any evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case.")

⁴ See *Canania v. Director of Revenue*, 918 S.W.2d 310, 313 (Mo. App. 1996).

⁵ Ex. 1, p. 3

2. Liberty is a Missouri corporation, a gas corporation, and a public utility. Liberty's ultimate corporate parent is Algonquin Power and Utilities Corp., a Canadian corporation whose stock is traded on the Toronto Stock Exchange. Liberty provides natural gas service to approximately 85,000 customers in Missouri, Illinois, and Iowa. Approximately 55,000 of those customers are in Missouri.⁶

3. Liberty serves its Missouri customers through three rate districts: Northeast (NEMO), Southeast (SEMO), and West (WEMO).⁷

General Conclusions of Law

1. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested-to subject matter.⁸

2. Liberty is a gas utility and a public utility subject to Commission jurisdiction.⁹ The Commission has authority to regulate the rates Liberty may charge for gas.¹⁰

3. The Commission is authorized to value the property of gas utilities in Missouri.¹¹ Necessarily, that includes property and other assets proposed for inclusion in rate base. In determining value, "the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question"¹² The courts have held that this statute means that the Commission's determination of the proper rate must be based on consideration of all relevant factors.¹³ Relevant factors include questions raised by stakeholders about the prudence and necessity of utility construction decisions and expenditures.

⁶ Id. at 4.

⁷ Id. at 6.

⁸ Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo. App. 2005).

⁹ Section 386.020(15), (42) RSMo Cum Supp. 2013 (all statutory cites to RSMo Cum. Supp. 2013 unless otherwise indicated).

¹⁰ Section 393.140(11).

¹¹ Section 393.230.1.

¹² Section 393.270.4.

¹³ *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998); *State ex rel. Office of Public Counsel v. Public Service Commission of Missouri*, 858 S.W.2d 806 (Mo. App., W.D. 1993).

4. In making its determination, the Commission may adopt or reject any or all of any witnesses' testimony.¹⁴ Testimony need not be refuted or controverted to be disbelieved by the Commission.¹⁵ The Commission determines what weight to accord to the evidence adduced.¹⁶ "It may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it."¹⁷ The Commission may evaluate the expert testimony presented to it and choose between the various experts.¹⁸

5. Where the evidence conflicts, the Commission determines which evidence is most credible. The Commission's determinations of credibility are implicit in the Commission's findings of fact.¹⁹ No law requires the Commission to expound upon which portions of the record the Commission accepted or rejected.²⁰

6. The Staff of the Commission is represented by the Commission's Staff Counsel, an employee of the Commission authorized by statute to "represent and appear for the commission in all actions and proceedings involving this or any other law [involving the commission.]"²¹ The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"²² The remaining parties include an industrial consumer and a governmental entity.

Burden of Proof

7. "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . gas corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."²³

¹⁴ *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880 (Mo. App., W.D. 1985).

¹⁵ *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 65 (Mo. banc 1949).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Associated Natural Gas, supra*, 706 S.W.2d at 882.

¹⁹ *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 26 (Mo. banc 2011).

²⁰ *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

²¹ Section 386.071.

²² Sections 386.700 and 386.710.

²³ Section 393.150.2.

Ratemaking Standards and Practices

8. The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,²⁴ subject to judicial review of the question of reasonableness.²⁵ A "just and reasonable" rate is one that is fair to both the utility and its customers;²⁶ it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."²⁷ In 1925, the Missouri Supreme Court stated:²⁸

The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

9. The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity.²⁹ "[T]he dominant thought and purpose of the policy is the protection of the public . . . [and] the protection given the utility is merely incidental."³⁰ However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.³¹ "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."³²

²⁴ Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

²⁵ *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (Mo. banc.1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (Mo. banc. 1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

²⁶ *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App. 1974).

²⁷ *St. ex rel. Washington University et al. v. Pub. Serv. Comm'n*, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

²⁸ *Id.*

²⁹ *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 48 (Mo. App. 1937).

³⁰ *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (1944).

³¹ *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

³² *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. 1981).

10. The Commission has exclusive jurisdiction to establish public utility rates,³³ and the rates it sets have the force and effect of law.³⁴ A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;³⁵ neither can a public utility change its rates without first seeking authority from the Commission.³⁶ A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's.³⁷ Thus, “[r]atemaking is a balancing process.”³⁸

11. Ratemaking involves two successive processes: first, the determination of the “revenue requirement,” that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.³⁹ The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers.

12. Revenue requirement is usually established based upon a historical test year that focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. The calculation of revenue requirement from these four factors is expressed in the following formula:

$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;
 C = Prudent Operating Costs, including Depreciation Expense and Taxes;
 V = Gross Value of Utility Plant in Service;
 D = Accumulated Depreciation; and
 R = Overall Rate of Return or Weighted Cost of Capital.

13. The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.⁴⁰

³³ *May Dep't Stores, supra*, 107 S.W.2d at 57.

³⁴ *Utility Consumers Council, supra*, 585 S.W.2d at 49.

³⁵ *Id.*

³⁶ *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

³⁷ *May Dep't Stores, supra*, 107 S.W.2d at 50.

³⁸ *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

³⁹ *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

⁴⁰ *See St. ex rel. Union Elec. Co.*, 765 S.W.2d at 622.

14. The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. The Commission can prescribe uniform methods of accounting for utilities, and can examine a utility's books and records and, after hearing, can determine the accounting treatment of any particular transaction.⁴¹ In this way, the Commission can determine the utility's prudent operating costs. The Commission can value the property of electric utilities operating in Missouri that is used and useful to determine the rate base.⁴² Finally, the Commission can set depreciation rates and adjust a utility's depreciation reserve from time-to-time as may be necessary.⁴³

15. The Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by multiplying the value of the utility's depreciated assets by a rate of return. For any utility, its fair rate of return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of common equity, the cost used is its estimated cost.

The Issues

I. Cost of capital

a. **What capital structure should the Commission use in this case to determine a revenue requirement for Liberty?**

Findings of Fact

4. Liberty's ultimate parent company is Algonquin Power & Utilities Corporation ("Algonquin"). One of Algonquin's business units is Liberty Utilities (Canada) Corp. ("LUC"), which owns 100% interest in Liberty Utilities Company ("LUCo"). Liberty, in turn, falls under Liberty Utilities Company.⁴⁴

5. In the present case, Staff's recommended capital structure is the actual capital structure of Liberty's direct parent, LUCo. Liberty is part of a holding-company system; its book capital structure and capital costs are not a true reflection of the system's capital costs with respect to Liberty.⁴⁵

6. LUCo is the entity that drives Liberty's cost of capital.⁴⁶

7. Liberty does not have a credit rating.⁴⁷

⁴¹ Section 393.140.

⁴² Section 393.230. Section 393.135 expressly prohibits the inclusion in electric rates of costs pertaining to property that is not "used and useful."

⁴³ Section 393.240.

⁴⁴ Ex. 13, p. 3.

⁴⁵ Ex. 31, p. 4.

⁴⁶ Ex. 13, pp. 18-19

⁴⁷ Id. at 16.

8. Liberty does not issue equity.⁴⁸
9. Liberty does not issue long-term debt, and does not raise its own short-term debt.⁴⁹
10. All of the items listed in paragraphs 7-9 above occur at the LUCo level.⁵⁰
11. LUCo issues long-term debt to debt investors and issues equity indirectly to Algonquin. Then, it allocates portions of this capital to the operations that need capital at the time. Thus, Liberty's capital structure is an allocated capital structure or book capital structure.⁵¹
12. LUCo uses its internal finance department to manage and determine capital structures of its operations (including Liberty). Liberty's capital structure is an internally assigned capital structure that has no bearing on the cost of capital for Liberty.⁵²
13. Liberty justifies using its book capital structure by noting Algonquin's actual capital structure is similar. However, Algonquin's operations are not similar to Liberty's; significantly, Algonquin's operations include both regulated and unregulated entities.⁵³
14. DBRS (a Canadian credit rating agency) rates LUCo and APUC separately.⁵⁴
15. DBRS gives LUCo a higher credit rating than Algonquin.⁵⁵
16. A lower business risk subsidiary can issue more debt than the higher business risk subsidiary. Liberty's ratepayers should not have to pay an equity return on the higher equity ratio needed to offset Algonquin's higher business risk.⁵⁶
16. The Commission may disregard the actual book capital structure of a utility when it is deemed to be in the public interest to do so.⁵⁷
17. There are two circumstances in which it is appropriate for the Commission to use a hypothetical capital structure.⁵⁸
18. One circumstance is "when the utility's actual debt-equity ratio is deemed inefficient and unreasonable because it contains too much equity and not enough debt, necessitating an inflated rate of return."⁵⁹

⁴⁸ Id. at 18-19

⁴⁹ Id. at 19.

⁵⁰ Ex. 31, p. 4.

⁵¹ Id.

⁵² Id. at 2.

⁵³ Ex. 13, p. 3.

⁵⁴ Ex. 32, p. 3.

⁵⁵ Id. at 4.

⁵⁶ Id. at 8.

⁵⁷ State ex. rel. Associated Natural Gas Co. v. Public Service Com'n of Missouri, 706 S.W.2d 870, 878 (Mo.App. W.D. 1985).

⁵⁸ Id.

⁵⁹ Id.

19. The second circumstance that justifies adopting a hypothetical construct occurs when the utility is part of a holding company system. In such situations, the utility's book capital structure and capital costs may not be a true reflection of the system's capital costs with respect to a particular operating company. Double leveraging represents one approach utilized by regulatory agencies to account for a utility's status as a subsidiary in a holding company system. Moreover, it is only the parent's alleged use of its low cost debt to purchase stock in its subsidiary that serves as the principle behind the application of double leveraging.⁶⁰

Decision

The Commission finds this issue in favor of Staff. Liberty proposed a capital structure more like Algonquin's. But Algonquin's capital structure reflects its higher business risk due to its unregulated activities. Liberty, which is regulated, does not face the same business risk as Algonquin. Thus, Liberty should not be able to charge its Missouri ratepayers as if it needed a more equity rich capital structure like Algonquin's. Thus, the appropriate capital structure is that of Liberty Utility Company's structure, the company that issues debt and equity on behalf of Liberty.

b. What is the appropriate embedded cost of debt that the Commission should apply in this case to determine a revenue requirement for Liberty?

Findings of Fact

17. Liberty does not issue debt.⁶¹

18. Liberty proposes a 4.5% cost of debt, which is its assigned cost of debt through its parent companies.⁶²

19. LUCo issues debt, and passes debt capital out to subsidiaries as needed.⁶³

20. The debt and debt cost on Liberty's books are products of the debt allocation process LUCo performs for its United States operations.⁶⁴

⁶⁰ Id. at 878-79.

⁶¹ Ex. 13, p. 18.

⁶² Ex. 6NP, p. 46.

⁶³ Id., at 19.

⁶⁴ Id. at 21.

Conclusions of Law

There are no additional conclusions of law.

Decision

The Commission finds this issue in favor of Staff. Liberty proposed a 4.5% cost of debt, which is its assigned cost of debt through its parent companies. Having chosen Staff's capital structure, which is based on Liberty Utilities Company's capital structure, it follows that the appropriate cost of debt should be based upon Liberty Utilities Company's embedded cost of debt.

c. What is the appropriate cost of equity that the Commission should apply in this case to determine a revenue requirement for Liberty?

Findings of Fact

21. Mr. Zephania Marevangepo is Staff's return on equity witness.⁶⁵

22. The midpoint of Mr. Marevangepo's recommended return on equity range is 8.7%, which would give Liberty a return on equity more than 60 basis points lower than any return on equity at any state Commission in at least 30 years.⁶⁶ Staff's testimony did not support such a low return on equity. Thus, the Commission does not find this testimony persuasive.

23. Liberty's cost of capital witness is Robert Hevert.⁶⁷

24. Because all return on equity models are subject to various assumptions and constraints, equity analysts and investors tend use multiple methods to develop their return requirements. Mr. Hevert therefore appropriately relied on three widely-accepted approaches to develop his return on equity ("ROE") recommendation: (1) the Discounted Cash Flow ("DCF") model, including the Quarterly Growth, Constant Growth, and Multi-Stage forms; (2) the Capital Asset Pricing Model ("CAPM"); and (3) the Bond Yield Plus Risk Premium approach.⁶⁸

25. Since the ROE is a market-based concept, and Liberty is not a publicly traded entity, it is necessary to establish a group of comparable publicly-traded companies to serve as its "proxy." Even if Liberty were a publicly traded entity, short-term events could bias its market value during a given period of time. A significant benefit of using a proxy group is that it serves to moderate the effects of anomalous, temporary events associated with any one company.⁶⁹

⁶⁵ Tr. 182.

⁶⁶ Ex. 6, p. 3.

⁶⁷ Ex. 5, p. 2.

⁶⁸ Ex. 5, p. 3.

⁶⁹ Id. at 6.

26. To select his proxy group, Mr. Hevert began with the universe of companies that Value Line classifies as Electric or Natural Gas Utilities, which includes a group of 58 domestic U.S. utilities, and applied the following screening criteria:

- He excluded companies that do not consistently pay quarterly cash dividends;
- All of the companies in the proxy group have been covered by at least two utility industry equity analysts;
- All of the companies have investment 1 grade senior unsecured bond and/or corporate credit ratings from Standard & Poor's ("S&P");
- Companies with at least 60.00 percent of consolidated net operating income derived from regulated natural gas utility operations; and
- Companies currently known to be party to a merger, or other significant transaction were eliminated.⁷⁰

27. The companies that met Mr. Hevert's screening criteria, which the Commission finds Mr. Hevert chose appropriately, were:⁷¹

Company	Ticker
AGL Resources	GAS
Atmos Energy	ATO
Laclede Group	LG
New Jersey Resources	NJR
Northwest Natural Gas	NWN
Piedmont Natural Gas	PNY
South Jersey Industries	SJI
Southwest Gas	SWX
Washington Gas Light	WGL

28. After selecting his proxy group, Mr. Hevert used a Discounted Cash Flow model. The DCF approach is based on the theory that a stock's current price represents the present value of all expected future cash flows. In its simplest form, the DCF model expresses the Cost of Equity as the sum of the expected dividend yield and long-term growth rate.⁷²

⁷⁰ Id. at 7-8.

⁷¹ Id. at 8.

⁷² Id. at 11.

29. The DCF model assumes that the total return received by investors includes the dividend yield, and the rate of growth. Under the model's assumptions, the rate of growth equals the rate of capital appreciation. That is, the model assumes that the investor's return is the sum of the dividend yield and the increase in the stock price.⁷³

30. However, most dividend-paying companies, including utilities, pay dividends on a quarterly (as opposed to an annual) basis. The yield component of the Quarterly Growth DCF model, therefore, accounts for the quarterly payment of dividends. Thus, the Quarterly Growth DCF model incorporates investors' expectation of the quarterly payment of dividends, and the associated quarterly compounding of those dividends as they are reinvested at investors' required ROE.⁷⁴

31. To calculate the expected dividends over the coming year for the proxy companies, Mr. Hevert obtained the last four paid quarterly dividends for each company, and multiplied them by one plus the growth rate. He also used three averaging periods to calculate an average stock price to ensure the model's results are not skewed by anomalous events.⁷⁵

32. Earnings growth projections have a statistically significant relationship to stock valuation levels, while dividend growth rates do not. Investors form their investment decisions based on expectations of growth in earnings, not dividends. Consequently, earnings growth not dividend growth is the appropriate estimate for the purpose of the Constant Growth DCF model.⁷⁶

33. Mr. Hevert's quarterly growth DCF results, which the Commission finds to be reasonable, are:⁷⁷

	<i>Mean Low</i>	<i>Mean</i>	<i>Mean High</i>
30-Day Average	8.05%	9.29%	10.76%
90-Day Average	8.05%	9.28%	10.76%
180-Day Average	8.03%	9.26%	10.74%

34. Mr. Hevert also used a Constant Growth DCF model. The Constant Growth DCF model assumes: (1) a constant average annual growth rate for earnings and dividends; (2) a stable dividend payout ratio; (3) a constant price-to-earnings multiple; and (4) a discount rate greater than the expected growth rate. Under those assumptions, dividends, earnings, book value, and the stock price all grow at the same, constant rate.⁷⁸

35. Mr. Hevert used the same projected earnings per share growth rates and the retention growth estimate that he used in his Quarterly Growth DCF analysis.⁷⁹

36. Mr. Hevert's constant growth DCF results, which the Commission finds to be reasonable, are:⁸⁰

⁷³ Id. at 11.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id. at 15.

⁷⁷ Id. at 17.

⁷⁸ Id. at 17.

⁷⁹ Id. at 18.

⁸⁰ Id. at 19.

	<i>Mean Low</i>	<i>Mean</i>	<i>Mean High</i>
30-Day Average	7.93%	9.12%	10.55%
90-Day Average	7.92%	9.12%	10.55%
180-Day Average	7.90%	9.10%	10.53%

37. In order to address certain limiting assumptions underlying the Constant Growth form of the DCF model, Mr. Hevert also used the Multi-Stage (three-stage) DCF Model. The Multi-Stage model is an extension of the Constant Growth model. It allows the analyst to specify growth rates over three distinct stages. As with the Constant Growth model, the Multi-Stage form defines the Cost of Equity as the discount rate that sets the current price equal to the discounted value of future cash flows. Unlike the Constant Growth form, however, the Multi-Stage model must be solved in an iterative fashion.⁸¹

38. The Multi-Stage model sets the subject company's stock price equal to the present value of future cash flows received over three "stages". In the first two stages, "cash flows" are defined as projected dividends. In the third stage, "cash flows" equal both dividends and the expected price at which the stock will be sold at the end of the period (*i.e.*, the "terminal price").⁸²

39. Since the model provides the ability to specify near, intermediate and long-term growth rates, for example, it avoids the sometimes limiting assumption that the subject company will grow at the same, constant rate in perpetuity. In addition, by calculating the dividend as the product of earnings and the payout ratio, the model enables analysts to reflect assumptions regarding the timing and extent of changes in the payout ratio to reflect, for example, increases or decreases in expected capital spending, or transition from current payout levels to long-term expected levels.⁸³

40. Mr. Hevert's multi-stage growth DCF results, which the Commission finds to be reasonable, are:⁸⁴

	<i>Mean Low</i>	<i>Mean</i>	<i>Mean High</i>
30-Day Average	9.58%	9.92%	10.36%
90-Day Average	9.58%	9.91%	10.36%
180-Day Average	9.56%	9.89%	10.34%

41. Mr. Hevert also used a Capital Asset Pricing Model ("CAPM") analysis. This method of estimating the cost of equity uses a risk-free return plus a risk premium.⁸⁵

42. Because utility assets represent long-term investments, Mr. Hevert used two different measures of the risk-free rate: the current 30-day average yield on 30-year Treasury bonds (3.87%), and the projected 30-year Treasury yield (4.15%).⁸⁶

⁸¹ Id.

⁸² Id.

⁸³ Id. at 20-21.

⁸⁴ Id. at 19.

⁸⁵ Id. at 25.

⁸⁶ Id. at 27.

43. Due to recent economic conditions, such as the 2008 Lehman Brothers bankruptcy filing, Mr. Hevert used a forward-looking estimate of the market risk premium, rather than a historical average.⁸⁷

44. Mr. Hevert's CAPM results, which the Commission finds to be reasonable, suggest a return on equity of 10.21 to 12.78%. A summary of his results are below:⁸⁸

	<i>Bloomberg Derived Market Risk Premium</i>	<i>Value Line Derived Market Risk Premium</i>
<i>Average Calculated Beta Coefficient</i>		
Current 30-Year Treasury (3.87%)	12.50%	11.40%
Near Term Projected 30-Year Treasury (4.15%)	12.78%	11.68%
<i>Average Bloomberg Beta Coefficient</i>		
Current 30-Year Treasury (3.87%)	11.96%	10.93%
Near Term Projected 30-Year Treasury (4.15%)	12.24%	11.21%
<i>Average Value Line Beta Coefficient</i>		
Current 30-Year Treasury (3.87%)	11.14%	10.21%
Near Term Projected 30-Year Treasury (4.15%)	11.42%	10.49%

45. Mr. Hevert also employed a bond yield plus risk premium approach. It is based on the concept that equity holders' payments are subordinate to bondholders' payments, and, consequently, equity holders will require a premium to take on the risk of not being paid a return on investment.⁸⁹

46. The results of Mr. Hevert's bond yield plus risk premium analysis, which the Commission finds to be reasonable, showed an estimated cost of equity between 10.19 and 10.69%.⁹⁰

47. Mr. Hevert's return on equity recommendation is 10.0% to 10.5%.⁹¹

⁸⁷ Id.

⁸⁸ Id. at 30-31.

⁸⁹ Id. at 31.

⁹⁰ Id. at 33-34.

⁹¹ Ex. 6, p. 3.

Conclusions of Law

20. The Commission must estimate the cost of common equity capital. This is a difficult task, as academic commentators have recognized.⁹² The United States Supreme Court, in two frequently cited decisions, has established the constitutional parameters that must guide the Commission in its task.⁹³ In the earlier of these cases, *Bluefield Water Works*, the Court stated that:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁹⁴

21. In the same case, the Court provided the following guidance as to the return due to equity owners:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.⁹⁵

22. The Court restated these principles in *Hope Natural Gas Company*, the later of the two cases:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the

⁹² C.F. Phillips, Jr., *The Regulation of Public Utilities*, 390 (1993); Goodman, 1 *The Process of Ratemaking*, *supra*, at 606.

⁹³ *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); *Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

⁹⁴ *Bluefield*, *supra*, 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

⁹⁵ *Id.*, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.⁹⁶

23. The Commission must draw primary guidance in the evaluation of the expert testimony from the Supreme Court's *Hope* and *Bluefield* decisions. Pursuant to those decisions, returns for Liberty's shareholders must be commensurate with returns in other enterprises with corresponding risks. Just and reasonable rates must include revenue sufficient to cover operating expenses, service debt and pay a dividend commensurate with the risk involved. The language of *Hope* and *Bluefield* unmistakably requires a *comparative method*, based on a quantification of risk.

24. Investor expectations are not the sole determiners of ROE under *Hope* and *Bluefield*; we must also look to the performance of other companies that are similar to Liberty in terms of risk. *Hope* and *Bluefield* also expressly refer to objective measures. The allowed return must be sufficient to ensure confidence in the financial integrity of the company in order to maintain its credit and attract necessary capital. By referring to confidence, the Court again emphasized risk.

25. The Commission cannot simply find a rate of return on equity that is "correct"; a "correct" rate does not exist. However, there are some numbers that the Commission can use as guideposts in establishing an appropriate return on equity. The Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average."⁹⁷ Nevertheless, the national average is an indicator of the capital market in which Liberty will have to compete for necessary capital.

26. The Commission has described a "zone of reasonableness" extending from 100 basis points above to 100 basis points below the recent national average of awarded ROEs to help the Commission evaluate ROE recommendations.⁹⁸ Because the evidence shows the recent national average ROE for gas utilities is 9.69%,⁹⁹ that "zone of reasonableness" for this case is 8.69% to 10.69%.

27. The Commission has wide latitude in setting an ROE within the zone of reasonableness.¹⁰⁰ The zone of reasonableness is simply a tool to help the Commission to evaluate the recommendations offered by various rate of return experts. It should not be taken as an absolute rule that would preclude consideration of recommendations that fall outside that zone.

⁹⁶ *Hope Nat. Gas Co.*, *supra*, 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

⁹⁷ *In re Missouri Gas Energy*, 12 Mo.P.S.C.3d 581, 593 (*Report and Order* issued September 21, 2004).

⁹⁸ *Id.*

⁹⁹ Ex. 6, p. 19.

¹⁰⁰ *State ex. rel. Public Counsel*, 274 S.W.3d at 574 (*citing In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968))("courts are without authority to set aside any rate selected by the Commission [that] is within a 'zone of reasonableness'")(emphasis supplied).

28. In the final analysis, the method employed to estimate the cost of common equity is unimportant, as long as the result that is reached satisfies the constitutional requirements.¹⁰¹

Decision

The Commission finds this issue in favor of Liberty. The Commission will set the return on equity at 10.0%, which is the bottom of the range Liberty proposed.¹⁰² Such a return on equity is commensurate with returns of other corporations with corresponding risks, will ensure confidence in the financial integrity of the company, and is near the midpoint of the above-mentioned zone of reasonableness.

II. Contract Customers¹⁰³

a. Is Liberty currently authorized to enter into special contracts at non- tariffed rates with its customers in Missouri, such as Noranda and General Mills?

Findings of Fact

48. Liberty has a special contract in place with Noranda, which is in Liberty's SEMO Division.¹⁰⁴

49. The Noranda contract pre-dates the 2000 Atmos acquisition of Associated Natural Gas and was in effect during the test year.¹⁰⁵

50. Noranda has the option to bypass Liberty and interconnect with the interstate pipeline operated by Texas Eastern Transmission Company (TETCO). The special contract keeps Noranda from switching, and ultimately benefits Liberty's customers.¹⁰⁶

51. Liberty also has a special contract in place with General Mills, which is in effect during the test year. General Mills is in Liberty's NEMO Division.¹⁰⁷

52. The General Mills plant in the special contract is within 1400 feet of an interstate pipeline operated by Panhandle Eastern Pipeline Company (PEPL). Thus, the plant could bypass Liberty and connect to PEPL.¹⁰⁸

¹⁰¹ *State ex rel. Arkansas Power & Light Company v. Missouri Public Service Commission*, 736 S.W.2d 457,462 (Mo.App., W.D. 1987); *State ex rel. Associated Natural Gas Company v. Public Service Commission of Missouri*, 706 S.W.2d 870, 879 (Mo.App., W.D. 1985).

¹⁰² Ex. 5, p. 3.

¹⁰³ Much of the evidence for this issue is Highly Confidential. This Report and Order does not contain any Highly Confidential evidence, although the evidence it cites is often Highly Confidential.

¹⁰⁴ Ex. 2, p. 17.

¹⁰⁵ Ex. 3, p. 3.

¹⁰⁶ Ex. 2, p. 18.

¹⁰⁷ Ex. 2, p. 17.

¹⁰⁸ *Id.* at 18-19., Ex. 3, p. 9.

53. These two special contracts provide two large customers that contribute to fixed and variable cost recovery of Liberty's cost of service. If Liberty lost those customers, Liberty's other customers would likely see a rate increase.¹⁰⁹

54. Noranda uses over 20,000 times as much natural gas as an average residential customer in the SEMO Division.¹¹⁰

Conclusions of Law

There are no additional conclusions of law.

Decision

The Commission finds this issue in favor of Liberty. The Commission finds that Liberty stepped into the shoes of Atmos when it purchased Atmos' assets, and that Liberty had the right to charge Noranda and General Mills the rates it did during the test year.

b. If Liberty is not currently authorized to enter into special contracts at non-tariffed rates with its customers in Missouri such as Noranda and General Mills should the Commission authorize Liberty to adopt a tariff to allow it to enter into such special contracts? If yes, what should such tariff state?

Findings of Fact

55. Without a tariff, special contracts may be discriminatory since the contracts would give special treatment for some customers, completely at Liberty's discretion.¹¹¹

56. Although Liberty submitted a specimen tariff, that tariff is ambiguous about the relationship between a special contract and Liberty's existing tariffs.¹¹²

57. Liberty's proposed tariff also has the title of "Negotiated Gas Sales Service", which applies to Liberty's sales service and alternative fuel customers. Thus, Liberty's proposed tariff is confusing as it is unclear if it is to deal with transportation service, sales service, or both.¹¹³

58. Also, Liberty's proposed tariff does not require a customer to give Liberty any evidence of the investment needed for the customer to take service directly from the bypass provider. Staff's proposed tariff, however, does impose such a requirement.¹¹⁴

Conclusions of Law

There are no additional conclusions of law.

¹⁰⁹ Id. at 19.

¹¹⁰ Ex. 46, p. 6.

¹¹¹ Ex. 13HC, p. 53.

¹¹² Ex. 39HC, p. 9.

¹¹³ Id. at 9-10.

¹¹⁴ Ex. 3HC, Sch. CDK-R7 and Ex. 39HC, Sch. DMS-5.

Decision

The Commission finds this issue in favor of Staff. Liberty should have to provide Staff some justification for its special contracts. Liberty can best do so through a tariff. The Commission finds Liberty should file a tariff as suggested by Staff.

c. What rate should the Commission use to calculate Liberty's revenues from Noranda and General Mills for purposes of this rate case?

Findings of Fact

59. Staff recommends calculating Liberty's revenues from Noranda and General Mills by imputing the Commission-approved tariff rate, rather than the discounted rate established in the special contracts with these customers.¹¹⁵

60. Staff does not believe Liberty should have charged Noranda and General Mills the full-tariffed rate on the first day Liberty began operating the Missouri districts.¹¹⁶

61. In a previous Atmos rate case, Staff recommended revenue imputation adjustments for Noranda and General Mills, but ultimately the settlement in the last Atmos rate case explicitly stated that there would be no imputation of revenues for Noranda or General Mills. Atmos, Staff, Public Counsel, and Noranda entered into the following agreement:

7. Special Contracts. The Signatories agree that revenues associated with special contracts shall not be imputed in this case. The Signatories agree that Atmos shall offer to extend the special contracts of Noranda and General Mills to expire on the effective date of rates approved in Atmos's next general rate case. The rates for such extended period shall be those in effect at the end of the respective contract's original term. This paragraph shall not be construed to limit the ability of Atmos and Special Contract customers: i) to accept alternative mutually agreeable contract provisions, or ii) to enter into alternative mutually agreeable contracts for service."¹¹⁷

62. The Commission approved this stipulation.¹¹⁸

63. According to the Agreement with Staff and Public Counsel, Atmos was required to extend those contracts and use the same rates that were in effect at the end of the respective contract's original term.¹¹⁹

64. The Agreement to use these specific rates in the Noranda and General Mills contracts was not discretionary with Atmos. The rate provisions were mandatory, and agreed to by Atmos, Staff, Public Counsel, and Noranda.¹²⁰

¹¹⁵ Ex. 23NP, pp. 2-3.

¹¹⁶ Tr. 378.

¹¹⁷ *Unanimous Stipulation and Agreement*, File No. GR-2010-0192 (August 11, 2010).

¹¹⁸ Tr. 361.

¹¹⁹ Tr. 362.

¹²⁰ Tr. 364.

65. Had Liberty charged the rates Staff suggests in this case, Liberty would have violated the stipulation from File No. GR-2010-0192.¹²¹

66. Liberty purchased Atmos' Missouri assets, and was obligated to comply with all Commission orders applicable to Atmos.¹²²

67. The current cost to supply interruptible transportation service is about \$0.03 per Mcf.¹²³

68. Even if Noranda was treated as a firm transportation customer and the SEMO transmission network costs were allocated to Noranda, then Noranda's cost would be approximately \$0.11 per Mcf.¹²⁴

69. Regardless of whether Noranda is treated as an interruptible or a firm customer, Liberty charges Noranda more than its cost to serve Noranda.¹²⁵

70. General Mills and Noranda would likely bypass Liberty's local distribution network, switch to alternative fuels, or substantially reduce their natural gas consumption if the full-tariffed rates were charged.¹²⁶

71. During the test year, Liberty stepped into the shoes of Atmos and was required to charge Noranda and General Mills the same rates that were in the Atmos contracts with those customers.¹²⁷

Conclusions of Law

There are no additional conclusions of law.

Decision

The Commission finds this issue in favor of Liberty. Imputing the revenue that Staff seeks to impute to Liberty would greatly reduce Liberty's revenue requirement. That, in turn, could force Liberty to raise rates for Noranda and General Mills to the point that they, having the legal right to seek an alternative energy provider and the practical and economic incentive to do so, would likely leave Liberty's system. This would ultimately cause financial harm to Liberty and to its customers.

The negotiated rates Liberty charged Noranda and General Mills were reasonable because those rates covered all variable costs and some fixed costs of serving these customers. Imputing the tariffed rate would not accurately reflect the historical revenues or the expected revenues as the new tariff for special contracts does not require the Company to use the tariffed rates. If in fact any entity believes future rates negotiated under the Company's special contract tariff are excessively discounted, those entities may file a Complaint under the Commission's Complaint procedures.

¹²¹ Tr. 273.

¹²² *Order Approving Unanimous Stipulation and Agreement*, File No. GM-2012-0037 (March 14, 2012).

¹²³ Ex. 46HC, pp. 8-11.

¹²⁴ Id. at 10.

¹²⁵ Id. at 4, 8-11.

¹²⁶ Ex. 2NP, pp. 17-18; Ex. 3HC, pp. 3-9; Ex. 4HC, pp. 9-10; Ex. 46HC, pp. 2-11; Ex. 57, p. 24; Ex. 58, pp. 3-9; Ex. 59, pp. 3-14.

¹²⁷ Tr. 361.

d. What rate should the Commission use to calculate Liberty's revenues from SourceGas for purposes of this rate case?

Findings of Fact

72. Liberty or its predecessor has provided interstate service to SourceGas (which was formerly known as Associated Natural Gas Company) since June 1, 2000, when ANG sold its Missouri assets to Atmos. At that time, the ANG local distribution system was being separated into a Missouri service territory operated by United Cities Gas, a division of Atmos, and an Arkansas service territory that would continue to be owned by ANG.¹²⁸

73. For the Arkansas property to have a gas pipeline and gas supply, there needed to be an interstate arrangement between Atmos and ANG that would allow Atmos to provide interstate transportation service to ANG after the service area was separated. Atmos obtained authority to provide interstate transportation services to SourceGas under flex or discount rates.¹²⁹

74. While Liberty was negotiating interstate transportation service terms with SourceGas at the Federal Energy Regulatory Commission ("FERC"), Liberty was also negotiating interstate transportation service terms with Atmos for its WEMO service territory in the Rich Hill-Hume area.¹³⁰

75. For SourceGas, Liberty is the provider of the interstate transportation service. On the other side of Missouri, however, in the Rich Hill-Hume area, Liberty is the customer, and receives gas using the interstate transportation service provided by Atmos from its Kansas facilities.¹³¹

76. When Liberty acquired the Atmos properties in Missouri, it was necessary to file with the FERC for approval of an open access interstate transportation service. Under the new approved arrangement, the Liberty rate results in benefits for Liberty customers in the SEMO district.¹³²

77. Liberty has on file with FERC an interstate transportation rate approved by the FERC in Docket No. CP12-42-000. That tariff allows Liberty to receive gas in Missouri and transport said gas across its SEMO distribution system to its state line interconnects with SourceGas. This transportation service is an open access service and is available to all similarly situated customers. The approved maximum transportation rate is \$1.3938 per Dth and mirrors the current Large Customer transportation rate for SEMO.¹³³

¹²⁸ Tr. 495-96; Ex. 12NP, p. 4.

¹²⁹ Tr. 494-96, 513

¹³⁰ Ex. 12NP, p. 11.

¹³¹ Tr. 524.

¹³² Tr. 500; Ex. 12HC, p. 5.

¹³³ Ex. 12HC, p. 3-4.

Conclusions of Law

29. A “state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.”¹³⁴

Decision

The Commission finds this issue in favor of Liberty. Although much of the evidence on this sub-issue is highly confidential, the Commission’s review of this evidence finds that Liberty acted reasonably both with SourceGas and Atmos.

III. Depreciation

Findings of Fact

78. The depreciation rate in question is for hardware and software that is used at Liberty’s corporate office in Jackson, Missouri and allocated to its divisions in Iowa, Illinois and Missouri jurisdictions.¹³⁵

79. In its Order Approving the Unanimous Stipulation and Agreement in File No. GM-2012-0037, the Commission ordered Liberty to adopt Atmos’ depreciation rates.¹³⁶

80. Atmos, Liberty’s predecessor, used Liberty’s proposed rates for these accounts in its 2006 and 2010 rate cases.¹³⁷

81. Staff used a 14.29% rate for system and network hardware and software, and an 18.98% rate for personal computer hardware and software in the 2010 case.¹³⁸

82. Thus, Liberty’s depreciation rates are in line with Staff’s rates for the most recent Atmos rate case.¹³⁹

83. Staff’s depreciation rate proposal of 4.75% reflects a 21-year life span for these assets. This is an unrealistically long life to apply to computer equipment and systems.¹⁴⁰

84. This would imply that systems and equipment purchased today would, on average, still be in service in the year 2035.¹⁴¹

Conclusions of Law

There are no additional conclusions of law.

¹³⁴ *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986).

¹³⁵ Ex. 10, p. 9.

¹³⁶ Ex. 13, p. 71; Tr. 588-89.

¹³⁷ Tr. 572.

¹³⁸ Ex. 36, pp. 1-2; Tr. 591-92.

¹³⁹ Ex. 11, p. 3.

¹⁴⁰ *Id.*

¹⁴¹ Ex. 10, p. 11.

Decision

The Commission finds this issue in favor of Liberty. Given the speed at which technology develops and changes, depreciation rates of 21 years for computer hardware and software are unreasonably long.

THE COMMISSION ORDERS THAT:

1. The Revised Second Partial Stipulation and Agreement filed by Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities Company, the Office of the Public Counsel, the Staff of the Commission and The Missouri Division of Energy on September 10, 2014, is approved, and the signatories are ordered to comply with its terms.
2. The proposed tariff sheets filed by Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities Company on February 6, 2014, Tariff No. YG-2014-0320, are rejected.
3. Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities shall file tariffs that comport with this Report and Order no later than December 10, 2014.
4. The Staff of the Commission shall file a recommendation regarding the tariffs ordered in paragraph 3 no later than December 11, 2014. Any party that wishes to object to the tariffs ordered in paragraph 3 shall do so no later than December 14, 2014.
5. All pending motions and other requests for relief not granted are denied.
6. This Report and Order shall become effective on January 2, 2015.

R. Kenney, Chm., Stoll, W. Kenney,
Hall, and Rupp, CC., concur and certify
compliance with the provisions of
Section 536.080, RSMo.

Dated at Jefferson City, Missouri, on
this 3rd day of December, 2014.

In the Matter of KCP&L Greater Missouri Operations)	
Company's Application for Authority to Establish a	)	<u>File No. EO-2014-0151</u>
Renewable Energy Standard Rate Adjustment)	
Mechanism)	

ELECTRIC. §39. Costs and expenses. RATES §101. Fuel clauses. In a tariff case, setting an electric company's renewable energy standard rate adjustment mechanism, one of the parties asked the Commission to make determinations on amounts related to customer-owned solar generation and landfill gas. To address those issues hypothetically would generally constitute an unpublished regulation. And those amounts were part of the company's fuel adjustment clause, which was subject to change only in a general rate case, so to address those issues specifically would constitute an advisory opinion. Therefore, the Commission denied that request.

ORDER DENYING RELIEF

Issue Date: December 17, 2014

Effective Date: January 16, 2015

On November 5, 2014, the Commission issued an *Order Approving Partial Stipulation and Agreement, Rejecting Tariff, and Establishing Procedural Schedule*, approving a stipulation and agreement ("Agreement") signed by KCP&L Greater Missouri Operations Company ("GMO"), the Office of the Public Counsel, Staff of the Commission, and Earth Island Institute d/b/a Renew Missouri ("Renew Missouri"). The Agreement stated that the Commission should approve a renewable energy standard rate adjustment mechanism ("RESRAM") for GMO and grant variances from the Commission's renewable energy standard rule. The Agreement also identified two remaining issues, raised by Renew Missouri, for Commission determination, as follows:

- a) Is the Company [GMO] required to calculate and report the financial benefits (including avoided costs) as savings achieved associated with costs incurred in meeting the requirements of the RES, specifically (1) costs of customer-owned solar generation and (2) costs of landfill gas used at the St. Joseph landfill gas plant?
- b) If so, how should such avoided costs and/or benefits be quantified?

GMO filed tariff sheets to establish a RESRAM in compliance with the Agreement and Commission order, which were subsequently approved by the Commission and became effective on December 1, 2014. No party has filed an application for rehearing of the Commission's orders pursuant to Section 386.500, RSMo 2000. At a prehearing conference on November 9, 2014 to discuss a procedural schedule for resolution of the remaining issues identified in the Agreement, the presiding officer ordered the parties to file briefs addressing the Commission's authority to grant the relief requested by Renew Missouri.

Renew Missouri argues in its brief that the GMO application for a RESRAM tariff violates Commission rules because it did not adequately quantify the benefits associated with its renewable energy standard costs. In addition, Renew Missouri states that the Commission should rule on how such benefits should be calculated before GMO's next rate case, where that issue may next arise. Renew Missouri encourages the Commission to make such determinations now because it would benefit other utilities who may be filing RESRAM proceedings in the future.

GMO's previous RESRAM application

With regard to Renew Missouri's criticism of GMO's previous application for a RESRAM, which tariff was approved by the Commission and became effective on December 1, 2014, GMO claims that this request for relief constitutes an impermissible and unlawful collateral attack upon the Commission's order in violation of Section 386.550, RSMo 2000.¹ Since the two issues raised by Renew Missouri were included in the Agreement between the parties, the Commission concludes that the current proceedings addressing those issues are ancillary to the RESRAM proceeding, rather than collateral, and so are not precluded by Section 386.550, RSMo 2000.² As the regulatory power of the Commission is such that it continues over time and is not limited to a single proceeding, the Commission may decide to re-visit previously-decided issues and has the legal authority to modify or vacate its orders³, including GMO's RESRAM tariff. However, the Agreement states that GMO's costs and revenues from compliance with the renewable energy standard are currently being flowed through GMO's fuel adjustment clause, which cannot be changed outside of a general rate proceeding.⁴ Therefore, to the extent that Renew Missouri requests that the Commission reconsider GMO's RESRAM tariff that it previously approved, the Commission declines to do so in this proceeding.

Since no law requires a hearing on this request for relief, this is a non-contested case.⁵ The Commission does not need to hear evidence before reaching a decision and does not need to make findings of fact and conclusions of law in announcing that decision.⁶ The Commission concludes that the relief requested by Renew Missouri to modify GMO's existing RESRAM tariff should be denied.

Future RESRAM proceedings

The RESRAM rule⁷ does not explain how benefits resulting from renewable energy standard compliance should be quantified, if at all. Renew Missouri urges the Commission to make such a determination now in order to prevent litigation and delay in future rate cases and RESRAM proceedings. But since the present controversy would involve only an examination of hypothetical costs and benefits, such a determination would constitute an advisory opinion, which the Commission is not authorized to issue.⁸

¹ "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

² See, *Fischer v. Public Service Commission*, 670 S.W.2d 24, 27 (Mo. App. 1984),

³ Section 386.490.2, RSMo (Supp. 2013), "Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States." (emphasis added)

⁴ File No. ER-2014-0373, *Order Approving Tariff to Change Fuel Adjustment Clause Rates*, issued on August 27, 2014.

⁵ Section 536.010(4), RSMo Supp. 2013, defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

⁶ *State ex rel. Public Counsel v. Public Service Commission*, 259 S.W.3d 23, 29 (Mo App. 2008).

⁷ Commission rule 4 CSR 240-20.100(6).

⁸ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 392 S.W.3d 24, 38 (Mo. App. 2012).

Moreover, conducting an evidentiary hearing to resolve these issues would not result in an adjudication on a specific set of accrued facts.⁹ Rather, the prospective relief sought by Renew Missouri would result in a statement of general applicability that implements, interprets or prescribes law or policy, or in other words, a rule.¹⁰ Agencies cannot engage in this type of rulemaking by an adjudicated order.¹¹ Pursuing such a change in the Commission's interpretation and implementation of its RESRAM rule requires compliance with the more stringent and lengthy process of rulemaking as required under Section 536.021, RSMo. While not every generally-applicable statement or announcement of intent by a state agency is a rule, an agency declaration that has the potential, however slight, of impacting the substantive or procedural rights of some member of the public is a rule.¹²

The Commission concludes that Renew Missouri's request for prospective relief does not state a claim upon which the Commission may grant relief and should be dismissed. The appropriate method for Renew Missouri to obtain the relief that it seeks is a petition for rulemaking filed with the Commission pursuant to Commission rule 4 CSR 240-2.180. The Commission will cancel the existing procedural schedule in a subsequent order.

THE COMMISSION ORDERS THAT:

1. Earth Island Institute d/b/a Renew Missouri's request for relief regarding the two issues identified in the stipulation and agreement approved by the Commission on November 5, 2014, is denied.
2. This order shall be effective on January 16, 2015.
3. This file shall be closed on January 17, 2015.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur.

Bushmann, Senior Regulatory Law Judge

⁹ In contrast to a rule, an adjudication is "[a]n agency decision which acts on a specific set of accrued facts and concludes only them." *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004).

¹⁰ Section 536.010(6) defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy." A rule is "[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified persons or facts." *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo.App.1979). *HTH Companies, Inc. v. Missouri Dept. of Labor and Indus. Relations*, 157 S.W.3d 224, 228 -229 (Mo. App. 2004); *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

¹¹ *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

¹² *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994).

In the Matter of the Application of Union Electric
 Company for Authority to Continue the Transfer
 of Functional Control of Its Transmission System
 to the Midwest Independent Transmission System
 Operator, Inc.

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File No. EO-2011-0128

ELECTRIC. §46. Relations between connecting companies generally. The Commission continued authorization for an electric company to transfer functional control of its transmission system from one regional transmission organization to another regional transmission organization conditioned on the filing of a future case, input from specified stakeholders, and reporting.

ORDER MODIFYING 2012 REPORT AND ORDER

Issue Date: December 22, 2014

Effective Date: January 1, 2015

On April 19, 2012, the Commission issued a report and order that authorized Union Electric Company, d/b/a Ameren Missouri, to continue the transfer of functional control of its transmission system to what was then known as the Midwest Independent Transmission System Operator, Inc. (MISO),¹ subject to several specified conditions. One of those conditions required Ameren Missouri to file a new case by November 15, 2015 to address its continued participation in MISO.

On November 24, 2014, Ameren Missouri, the Staff of the Commission, the Office of the Public Counsel, and the Missouri Industrial Energy Consumers (MIEC) filed a joint motion asking the Commission to modify the 2012 Report and Order to delay the filing of a new case until November 15, 2017.² The motion explains that the two-year delay would allow for a more accurate comparison of Ameren Missouri's option to stay in MISO or to move to the Southwest Power Pool, Inc. (SPP). In connection with that delay, the movants also propose to modify the timeline for the conduct of a cost-benefit study required by the Report and Order.

In response to the motion, the Commission directed that any party wishing to respond to the motion do so by December 4. MISO filed a response on December 2, indicating it does not object to the motion. No other party has responded. Therefore, the Commission will take up the motion as unopposed.

The motion would extend by two years the dates for considering whether Ameren Missouri should remain in MISO. The Commission finds that such an extension is appropriate. The Commission expects the parties to use the additional time to properly address the issues identified in the joint motion, those items included in this order, and to determine whether previous models of the benefits and costs of Ameren Missouri remaining a member of MISO remain adequate.

That corporation is now known as the Midcontinent Independent System Operator, Inc. but still uses the acronym MISO. It will be referred to as MISO throughout this order.

² The movants filed an amendment on November 26 to correct one of the revised dates proposed in the motion.

In addition to the issues identified in the joint motion, including the information described in footnote 3, the Commission expects any future analysis on the costs and benefits of Ameren Missouri remaining in MISO to include the impacts of (1) any resolution of FERC Docket ER14-1174, as well as other related FERC dockets; and (2) any changes to the current Congestion Management Process. The parties will need to address whether it is time to update the assumptions used in previous modeling in light of any changes to the above information items.

As the parties have agreed to begin discussions no later than September 30, 2015 on the above developments, the Commission will order the parties to file a status update on any modeling discussions every six months beginning October 30, 2015, until the next case is filed by November 15, 2017.

THE COMMISSION ORDERS THAT:

1. Portions of the April 19, 2012 Report and Order, as previously modified by the Commission's May 17, 2012 Order Granting Ameren Missouri's Motion to Clarify Report and Order, are further modified to state as follows:

2. Ameren Missouri's authority to continue the transfer of functional control of its transmission system to MISO is granted subject to the following conditions:

A. The Commission approves, on an interim basis, Ameren Missouri's continued Regional Transmission Organization (RTO)) participation in MISO during a term ending May 31, 2018, provided that if the Commission has not by May 31, 2018, further extended its approval of Ameren Missouri's participation in MISO, Ameren Missouri shall be deemed to have Commission approval to continue its MISO participation for the additional time necessary to re-establish functional control of its transmission system so that it may operate the same as an Independent Coordinator of Transmission (ICT), or to transfer functional control of its transmission system to another RTO. The extended permission granted in this order is also subject to the provisions of paragraph 2.O of this order. (from paragraph 9 of the stipulation and agreement)

B. Assuming that Ameren Missouri has not earlier requested withdrawal or that withdrawal has not otherwise occurred, by September 30, 2016, Ameren Missouri shall contact and consult with the Stakeholders to review with the Stakeholders the additional analysis Ameren Missouri believes is appropriate and necessary regarding Ameren Missouri's continued participation in an RTO after May 31, 2018, or its operation as an ICT. Such study, at a minimum, shall examine continued participation in MISO versus participation in SPP and continued participation in MISO versus operation as an ICT. Such study shall examine a period after May 31, 2018, of not less than five years or more than ten years. (from paragraph 10.b of the stipulation and agreement)

C. After taking into consideration in good faith the comments and input from the Stakeholders regarding the tentative analysis, Ameren Missouri shall, by December 1, 2016, advise the Stakeholders of the specific parameters, (including the minimum requirements provided for above) of the analysis Ameren Missouri intends to conduct. (from paragraph 10.b of the stipulation and agreement)

D. By November 15, 2017, Ameren Missouri shall file a pleading, along with the results of its actual analysis regarding its continued RTO participation or its possible operation as an ICT after May 31, 2018. That pleading shall also address, among other things, whether the Service Agreement or similar mechanism for the provision of transmission service to Missouri Bundled Retail Load should continue to remain in effect between Ameren Missouri and any RTO in which Ameren Missouri may participate after May 31, 2018. (from paragraph 10.b of the stipulation and agreement)

E. Ameren Missouri shall work with Staff, Public Counsel, and MIEC, and give them substantive input regarding the development of the specific methodology, inputs, outputs, and other features to be included in the November 15, 2017 actual analysis. Ameren Missouri shall advise and update MISO and SPP regarding that actual analysis. (from paragraph 10.b of the stipulation and agreement)

I. If any difference of opinion regarding the scope, particular details or preliminary assumptions that are necessary to and part of any supporting analysis to be performed by Ameren Missouri arises, Ameren Missouri shall ultimately have responsibility for, and the burden of presenting an analysis in support of whatever position it deems appropriate and necessary at the time of its November 15, 2017 filing. Accordingly, Ameren Missouri is entitled to maintain a level of independence and control of any such analysis, while other parties retain their right to oppose Ameren Missouri's positions or to provide alternative positions. (from paragraph 10.b of the stipulation and agreement)

O. If Ameren Missouri withdraws from MISO, or if the authority granted in this order is not extended beyond May 31, 2018, Ameren Missouri will have to re-establish functional control of its transmission system as a transmission provider, or, depending upon further orders of the Commission and the Federal Energy Regulatory Commission (FERC), may have to transfer functional control of its transmission system to another entity. In either case, Ameren Missouri would have to give notice to MISO of its withdrawal. Under Article Five of the Service Agreement, such notice shall not be effective before December 31 of the calendar year following the calendar year in which notice is given by Ameren Missouri to MISO. For a possible withdrawal from the MISO to occur no later than May 31, 2018, the Commission will need to issue a decision with respect to Ameren Missouri's continued participation in MISO no later than December 15, 2017. (from paragraph 10.f of the stipulation and agreement)

R. The investigatory case (EW-2012-0369) ordered in this paragraph of the April 19, 2012 Report and Order has been completed.

S. For transmission facilities located in Ameren Missouri's certificated service territory that are constructed by an Ameren affiliate and that are subject to regional cost allocation by MISO, for ratemaking purposes in Missouri, the costs allocated to Ameren Missouri by MISO shall be adjusted by an amount equal to the difference between: (i) the annual revenue requirement for such facilities that would have resulted if Ameren Missouri's Commission-authorized ROE and capital structure had been applied and there had been no construction work in progress (CWIP) (if applicable), or other FERC

Transmission Rate Incentives, including Abandoned Plant Recovery, recovery on a current basis instead of capitalizing pre-commercial operations expenses and accelerated depreciation, applied to such facilities and (ii) the annual FERC-authorized revenue requirement for such facilities. The ratemaking treatment established in this provision will, unless otherwise agreed or ordered, end with the Commission's order regarding Ameren Missouri's participation in MISO, another RTO, or operation as an ICT to be filed on or before November 15, 2017 as described in the order. (from paragraph 10.j of the stipulation and agreement)

T. For purposes of the conditions imposed in this order, the Stakeholders are defined as Union Electric Company, d/b/a Ameren Missouri, the Staff of the Commission, MISO, the Missouri Industrial Energy Consumers, the Office of the Public Counsel, The Empire District Electric Company, SPP, and the Missouri Joint Municipal Electric Utility Commission.

All other provisions of the 2012 Report and Order are unchanged and remain in effect.

2. On or before September 30, 2015, Ameren Missouri shall convene a stakeholder meeting or meetings to discuss any developments that may be pertinent to its continued MISO participation versus participation in another RTO or as an ICT. After such a meeting or meetings, any stakeholder may petition the Commission to further modify its 2012 Report and Order to change the timing of the conduct of a further cost-benefit study and subsequent filing of Ameren Missouri's next RTO-ICT-related case.

3. The parties shall provide a progress report every six months beginning October 30, 2015, until the next case is filed by November 15, 2017, on whether the modeling used in the EO-2011-0128 case remains capable of determining whether continued Ameren Missouri participation in MISO is in the public interest, or whether the modeling needs to be updated.

4. Ameren Missouri shall provide to stakeholders the information described in footnote 3 of the joint motion.

5. This order shall be effective on January 1, 2015.

R. Kenney, Chm., Stoll, W. Kenney, Hall,
and Rupp, CC., concur.

Woodruff, Chief Regulatory Law Judge

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

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- §41. Expenses generally
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ACCOUNTING

III. PARTICULAR ITEMS

§25. Maintenance, repairs and depreciation. The Commission rejected a party's proposed depreciation of computer hardware and software at 4.75% over 21 years as unreasonably long. **24 MPSC 3d 205**

§42. Accounting Authority Orders. A Commission regulation allows the issuance of an order under which an electric company may deferred recording outside a recording year for extraordinary expenses. Extraordinary expenses do not include transmissions costs associated with membership in regional transmission organizations, so the Commission denied an electric company's application for an accounting authority order. **24 MPSC 3d 106**

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CERTIFICATES

IV. GRANT OR REFUSAL OF CERTIFICATE OR PERMIT – FACTORS.

CERTIFICATES. Electric. §26. Public safety. The Commission, having already considered the resources of the applicant, denies an application for rehearing that asks for proof of financial responsibility in the event of a leak from its expanded utility related landfill. **24 MSPC 3d**

On an application for reconsideration, the Commission deleted a conclusion stating that the landfill liner met certain standards because the conclusion was disputed and unnecessary to the decision. The Commission, having already considered the resources of the applicant, denies an application for rehearing that asks for proof of financial responsibility in the event of a leak from its expanded utility related landfill. **24 MSPC 3d 98**

§28. Contracts. The Commission granted an application for one company to acquire the assets and assume the services of another, conditioned the execution of contracts for operation, billing, and emergency answering arrangements. **24 MPSC 3d 159**

§35. Existing service and facilities. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's application for a certificate of convenience and necessity to the other company. **24 MPSC 3d 4**

VI. CERTIFICATE OR PERMIT FOR PARTICULAR UTILITIES

§42. Electric and power. The Commission, having already considered the resources of the applicant, denies an application for rehearing that asks for proof of financial responsibility in the event of a leak from its expanded utility related landfill. **24 MSPC 3d 98**

§45. Water. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's application for a certificate of convenience and necessity to the other company. **24 MPSC 3d 4**

§47. Sewers. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's application for a certificate of convenience and necessity to the other company. **24 MPSC 3d 4**

VIII. TRANSFER, MORTGAGE OR LEASE

§53. Consolidation or merger. The Commission granted an application for one company to acquire the assets and assume the services of another, conditioned the execution of contracts for operation, billing, and emergency answering arrangements. **24 MPSC 3d 159**

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DEPRECIATION

No headnotes in this volume involved the question of depreciation.

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DISCRIMINATION

No headnotes in this volume involved the question of discrimination.

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- §41. Billing practices
- §42. Planning and management
- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §48.1 Qualifying facilities
- §49. Records and statements

ELECTRIC

I. IN GENERAL

§3. Certificate of convenience and necessity. The Commission granted a certificate of convenience and necessity to build a coal ash landfill. The Commission conditioned the order on the applicant securing all necessary permits from the Missouri Department of Natural Resources but rejected other proposed conditions as superfluous and unauthorized. **24 MPSC 3d 79**

II. JURISDICTION AND POWERS

§19. Discrimination. Customers of a public utility filed a complaint charging that the public utility's rate design was not just and reasonable because the customer could no longer afford it. The Commission found that the rate had not become unjust and unreasonable because, though a customer's continued operation was valuable to the economy of Missouri, the relief was not determinative of the customer's continued operations sought and would not benefit the public utility's other ratepayers. **24 MPSC 3d 114**

III. OPERATIONS

§14. Rules and regulations

Petitioner filed a petition for rulemaking that proposed amendments to the Commission's regulation on the requirements for a public utility to obtain a certificate of convenience and necessity. The Commission concluded that the proposed language did not comply with statutory requirements and so rejected the proposed language. But the Commission also directed its staff to further investigate the issues raised in the petition and draft proposed language to address those issues. **24 MPSC 3d 1**

§20. Rates. The Commission denied the complaint of public utility customers, which alleged that the public utility's rates were unjust and unreasonable, because the relief requested was selective, and the customers' evidence of overearnings was limited and addressed less than all relevant factors. **24 MPSC 3d 136**

§20. Rates. Customers of a public utility filed a complaint charging that the public utility's rate design was not just and reasonable because the customer could no longer afford it. The Commission found that the rate had not become unjust and unreasonable because, though a customer's continued operation was valuable to the economy of Missouri, the relief was not determinative of the customer's continued operations sought

and would not benefit the public utility's other ratepayers. **24 MPSC 3d 114**

§21. Refunds. The Commission approved an electric company's application and accompanying tariff providing when the electric company must cease payment on solar rebate applications. **24 MPSC 3d 133**

§39. Costs and expenses. In a tariff case, setting an electric company's renewable energy standard rate adjustment mechanism, one of the parties asked the Commission to make determinations on amounts related to customer-owned solar generation and landfill gas. To address those issues hypothetically would generally constitute an unpublished regulation. And those amounts were part of the company's fuel adjustment clause, which was subject to change only in a general rate case, so to address those issues specifically would constitute an advisory opinion. Therefore, the Commission denied that request. **24 MPSC 3d 229**

§42. Planning and management. The Commission approved a stipulation and agreement to change the provisions governing demand-side programs, which had resulted from an action nine years earlier, and approved the filing of tariffs as described in the stipulation and agreement. **24 MPSC 3d 70**

§43. Accounting Authority orders. A Commission regulation allows the issuance of an order under which an electric company may deferred recording outside a recording year for extraordinary expenses. Extraordinary expenses do not include transmissions costs associated with membership in regional transmission organizations, so the Commission denied an electric company's application for an accounting authority order. **24 MPSC 3d 106**

IV. RELATIONS BETWEEN CONNECTING COMPANIES.

§46. Relations between connecting companies generally. The Commission continued authorization for an electric company to transfer functional control of its transmission system from one regional transmission organization to another regional transmission organization conditioned on the filing of a future case, input from specified stakeholders, and reporting. **24 MPSC 3d 232**

EVIDENCE PRACTICE AND PROCEDURE

I. IN GENERAL

- §1. Generally
- §2. Jurisdiction and powers
- §3. Judicial notice; matters outside the record
- §4. Presumption and burden of proof
- §5. Admissibility
- §6. Weight, effect and sufficiency
- §7. Competency
- §8. Stipulation

II. PARTICULAR KINDS OF EVIDENCE

- §9. Particular kinds of evidence generally
- §10. Admissions
- §11. Best and secondary evidence
- §12. Depositions
- §13. Documentary evidence
- §14. Evidence by Commission witnesses
- §15. Opinions and conclusions; evidence by experts
- §16. Petitions, questionnaires and resolutions
- §17. Photographs
- §18. Record and evidence in other proceedings
- §19. Records and books of utilities
- §20. Reports by utilities
- §21. Views

III. PRACTICE AND PROCEDURE

- §22. Parties
- §23. Notice and hearing
- §24. Procedures, evidence and proof
- §25. Pleadings and exhibits
- §26. Burden of proof
- §27. Finality and conclusiveness
- §28. Arbitration
- §29. Discovery
- §30. Settlement procedures
- §31. Mediator
- §32. Confidential evidence
- §33. Defaults

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§1. Generally. A Commission regulation bars certain communications with the Commission that do not include other persons. An applicant for a certificate of convenience and necessity published a website and other materials related to the applicant's business. Such publications do not constitute a communication with the Commission so the applicant did not violate the regulation. **24 MPSC 3d 67**

III. PRACTICE AND PROCEDURE

§29. Discovery. The Commission may enforce discovery that is within "the practical reach" of the party served, like materials in the possession of a corporation's parent or related entities. **24 MPSC 3d 73**

EXPENSE

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Financing practices
- §4. Apportionment
- §5. Valuation
- §6. Accounting

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. EXPENSES OF PARTICULAR UTILITIES

- §10. Electric and power
- §11. Gas
- §12. Heating
- §13. Telecommunications
- §14. Water
- §15. Sewer

IV. ASCERTAINMENT OF EXPENSES

- §16. Ascertainment of expenses generally
- §17. Extraordinary and unusual expenses
- §18. Comparisons in absence of evidence
- §19. Future expenses

- §20. Methods of estimating
- §21. Intercorporate costs or dealings

V. REASONABLENESS OF EXPENSE

- §22. Reasonableness generally
- §23. Comparisons to test reasonableness
- §24. Test year and true up

VI. PARTICULAR KIND OF EXPENSE

- §25. Particular kinds of expenses generally
- §26. Accidents and damages
- §27. Additions and betterments
- §28. Advertising, promotion and publicity
- §29. Appraisal expense
- §30. Auditing and bookkeeping
- §31. Burglary loss
- §32. Casualty losses and expenses
- §33. Capital amortization
- §34. Collection fees
- §35. Construction
- §36. Consolidation expense
- §37. Depreciation
- §38. Deficits under rate schedules
- §39. Donations
- §40. Dues
- §41. Employee's pension and welfare
- §42. Expenses relating to property not owned
- §43. Expenses and losses of subsidiaries or other departments
- §44. Expenses of non-utility business
- §45. Expenses relating to unused property
- §46. Expenses of rate proceedings
- §47. Extensions
- §48. Financing costs and interest
- §49. Franchise and license expense
- §50. Insurance and surety premiums
- §51. Legal expense
- §52. Loss from unprofitable business
- §53. Losses in distribution
- §54. Maintenance and depreciation; repairs and replacements
- §55. Management, administration and financing fees
- §56. Materials and supplies
- §57. Purchases under contract
- §58. Office expense
- §59. Officers' expenses

- §60. Political and lobbying expenditures
- §61. Payments to affiliated interests
- §62. Rentals
- §63. Research
- §64. Salaries and wages
- §65. Savings in operation
- §66. Securities redemption or amortization
- §67. Taxes
- §68. Uncollectible accounts
- §69. Administrative expense
- §70. Engineering and superintendence expense
- §71. Interest expense
- §72. Preliminary and organization expense
- §73. Expenses incurred in acquisition of property
- §74. Demand charges
- §75. Expenses incidental to refunds for overcharges
- §76. Matching revenue/expense/rate base
- §77. Adjustments to test year levels
- §78. Isolated adjustments

EXPENSE

I. IN GENERAL

§6. Accounting. The Commission ordered the filing of tariffs that assign excess capacity to an account for which amounts do not count in rate base, and thus in rates, until used. **24 MPSC 3d 161**

VI. PARTICULAR KIND OF EXPENSE

§37. Depreciation. The Commission rejected a party's proposed depreciation of computer hardware and software at 4.75% over 21 years as unreasonably long. **24 MPSC 3d 205**

§54. Maintenance and depreciation; repairs and replacements. The Commission rejected a party's proposed depreciation of computer hardware and software at 4.75% over 21 years as unreasonably long. **24 MPSC 3d 205**

GAS

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §4. Abandonment or discontinuance
- §5. Liability for damages

- §6. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. CONSTRUCTION AND EQUIPMENT

- §10. Construction and equipment generally
- §11. Leakage, shrinkage and waste
- §12. Location
- §13. Additions and betterments
- §14. Extensions
- §15. Maintenance
- §16. Safety

IV. OPERATION

- §17. Operation generally
- §17.1. Purchased Gas Adjustment (PGA)
- §17.2. Purchased Gas-incentive mechanism
- §18. Rates
- §19. Revenue
- §20. Return
- §21. Service
- §22. Weatherization
- §23. Valuation
- §24. Accounting
- §25. Apportionment
- §26. Restriction of service
- §27. Depreciation
- §28. Discrimination
- §29. Costs and expenses
- §30. Reports, records and statements
- §31. Interstate operation
- §32. Financing practices
- §33. Billing practices
- §34. Accounting Authority orders
- §35. Safety

V. JOINT OPERATIONS

- §36. Joint operations generally
- §37. Division of revenue
- §38. Division of expenses
- §39. Contracts
- §40. Transportation

- §41. Pipelines
- VI. PARTICULAR KIND OF EXPENSES
- §42. Particular kinds of expenses generally
- §43. Accidents and damages
- §44. Additions and betterments
- §45. Advertising, promotion and publicity
- §46. Appraisal expense
- §47. Auditing and bookkeeping
- §48. Burglary loss
- §49. Casualty losses and expenses
- §50. Capital amortization
- §51. Collection fees
- §52. Construction
- §53. Consolidation expense
- §54. Depreciation
- §55. Deficits under rate schedules
- §56. Donations
- §57. Dues
- §58. Employee's pension and welfare
- §59. Expenses relating to property not owned
- §60. Expenses and losses of subsidiaries or other departments
- §61. Expenses of non-utility business
- §62. Expenses relating to unused property
- §63. Expenses of rate proceedings
- §64. Extensions
- §65. Financing costs and interest
- §66. Franchise and license expense
- §67. Insurance and surety premiums
- §68. Legal expense
- §69. Loss from unprofitable business
- §70. Losses in distribution
- §71. Maintenance and depreciation; repairs and replacements
- §72. Management, administration and financing fees
- §73. Materials and supplies
- §74. Purchases under contract
- §75. Office expense
- §76. Officers' expenses
- §77. Political and lobbying expenditures
- §78. Payments to affiliated interests
- §79. Rentals
- §80. Research
- §81. Salaries and wages
- §82. Savings in operation
- §83. Securities redemption or amortization
- §84. Taxes

- §85. Uncollectible accounts
- §86. Administrative expense
- §87. Engineering and superintendence expense
- §88. Interest expense
- §89. Preliminary and organization expense
- §90. Expenses incurred in acquisition of property
- §91. Demand charges
- §92. Expenses incidental to refunds for overcharges

GAS

I. IN GENERAL

§3. Certificate of convenience and necessity. The Commission granted a gas company's application to expand its service area but prescribed the account in which the company must record any cost for main line extension exceeded the customer contribution. **24 MPSC 3d 32**

IV. OPERATION

§18. Rates. Reasonable expenses include wholesale gas prices set by the Federal Energy Regulatory Commission **24 MPSC 3d 206**

§23. Valuation. The Commission ordered the filing of tariffs that record the value of purchased assets at net original cost. **24 MPSC 3d 161**

§24. Accounting. The Commission ordered the filing of tariffs that assign excess capacity to an account for which amounts do not count in rate base, and thus in rates, until used. **24 MPSC 3d 161**

The Commission granted a gas company's application to expand its service area but prescribed the account in which the company must record any cost for main line extension exceeded the customer contribution. **24 MPSC 3d 32**

VI. PARTICULAR KIND OF EXPENSES.

§74. Purchases under contract. Reasonable expenses include wholesale gas prices set by the Federal Energy Regulatory Commission. **24 MPSC 3d 205**

MANUFACTURED HOUSING

I. IN GENERAL

- §1. Generally
- §2. Obligation of the manufacturers and dealers
- §3. Jurisdiction and powers of Federal authorities
- §4. Jurisdiction and powers of the State Commission
- §5. Reports, records and statements

II. WHEN A PERMIT IS REQUIRED

- §6. When a permit is required generally
- §7. Operations and construction

III. GRANT OR REFUSAL OF A PERMIT

- §8. Grant or refusal generally
- §9. Restrictions or conditions
- §10. Who may possess
- §11. Public safety

IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION

- §12. Operations under the permit generally
- §13. Duration of the permit
- §14. Modification and amendment of the permit generally
- §15. Transfer, mortgage or lease generally
- §16. Revocation, cancellation and forfeiture generally
- §17. Acts or omissions justifying revocation or forfeiture
- §18. Necessity of action by the Commission
- §19. Penalties

MANUFACTURED HOUSING

No headnotes in this volume involved the question of Manufactured Housing issues.

PUBLIC UTILITIES**I. IN GENERAL**

- §1. Generally
- §2. Nature of
- §3. Functions and powers
- §4. Termination of status
- §5. Obligation of the utility

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of the Federal Commissions
- §9. Jurisdiction and powers of local authorities

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

- §10. Tests in general

- §11. Franchises
- §12. Charters
- §13. Acquisition of public utility property
- §14. Compensation or profit
- §15. Eminent domain
- §16. Property sold or leased to a public utility
- §17. Restrictions on service, extent of use
- §18. Size of business
- §19. Solicitation of business
- §20. Submission to regulation
- §21. Sale of surplus
- §22. Use of streets or public places

IV. PARTICULAR ORGANIZATIONS-PUBLIC UTILITY CHARACTER

- §23. Particular organizations generally
- §24. Municipal plants
- §25. Municipal districts
- §26. Mutual companies; cooperatives
- §27. Corporations
- §28. Foreign corporations or companies
- §29. Unincorporated companies
- §30. State or federally owned or operated utility
- §31. Trustees

PUBLIC UTILITIES

II. JURISDICTION AND POWERS

§7. Jurisdiction and powers of the state commission. The Commission deducted the unexpended balance of the Public Service Commission Fund from its estimated expenses for the coming year and directs the assessment of the remaining amount against public utilities. **24 MPSC 3d 77**

III. FACTORS AFFECTING PUBLIC UTILITY CHARACTER

§13. Acquisition of public utility property. The Commission granted an application for one company to acquire the assets and assume the services of another, conditioned the execution of contracts for operation, billing, and emergency answering arrangements. **24 MPSC 3d 159**

RATES

I. JURISDICTION AND POWERS

- §1. Jurisdiction and powers generally
- §2. Jurisdiction and powers of Federal Commissions

- §3. Jurisdiction and powers of the State Commission
- §4. Jurisdiction and powers of the courts
- §5. Jurisdiction and powers of local authorities
- §6. Limitations on jurisdiction and power
- §7. Obligation of the utility

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

- §8. Reasonableness generally
- §9. Right of utility to accept less than a reasonable rate
- §10. Ability to pay
- §11. Breach of contract
- §12. Capitalization and security prices
- §13. Character of the service
- §14. Temporary or emergency
- §15. Classification of customers
- §16. Comparisons
- §17. Competition
- §18. Consolidation or sale
- §19. Contract or franchise rate
- §20. Costs and expenses
- §21. Discrimination, partiality, or unfairness
- §22. Economic conditions
- §23. Efficiency of operation and management
- §24. Exemptions
- §25. Former rates; extent of change
- §26. Future prospects
- §27. Intercorporate relations
- §28. Large consumption
- §29. Liability of utility
- §30. Location
- §31. Maintenance of service
- §32. Ownership of facilities
- §33. Losses or profits
- §34. Effects on patronage and use of the service
- §35. Patron's profit from use of service
- §36. Public or industrial use
- §37. Refund and/or reduction
- §38. Reliance on rates by patrons
- §39. Restriction of service
- §40. Revenues
- §41. Return
- §42. Seasonal or irregular use
- §43. Substitute service

- §44. Taxes
- §45. Uniformity
- §46. Value of service
- §47. Value of cost of the property
- §48. Violation of law or orders
- §49. Voluntary rates
- §50. What the traffic will bear
- §51. Wishes of the utility or patrons

III. CONTRACTS AND FRANCHISES

- §52. Contracts and franchises generally
- §53. Validity of rate contract
- §54. Filing and Commission approval
- §55. Changing or terminating-contract rates
- §56. Franchise or public contract rates
- §57. Rates after expiration of franchise
- §58. Effect of filing new rates
- §59. Changes by action of the Commission
- §60. Changes or termination of franchise or public contract rate
- §61. Restoration after change

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

- §62. Initiation of rates and rate changes
- §63. Proper rates when existing rates are declared illegal
- §64. Reduction of rates
- §65. Refunds
- §66. Filing of schedules reports and records
- §67. Publication and notice
- §68. Establishment of rate base
- §69. Approval or rejection by the Commission
- §70. Legality pending Commission action
- §71. Suspension
- §72. Effective date
- §73. Period for which effective
- §74. Retroactive rates
- §75. Deviation from schedules
- §76. Form and contents
- §77. Billing methods and practices
- §78. Optional rate schedules
- §79. Test or trial rates

V. KINDS AND FORMS OF RATES AND CHARGES

- §80. Kinds and forms of rates and charges in general

- §81. Surcharges
- §82. Uniformity of structure
- §83. Cost elements involved
- §84. Load, diversity and other factors
- §85. Flat rates and charges
- §86. Mileage charges
- §87. Zone rates
- §88. Transition from flat to meter
- §89. Straight, block or step-generally
- §90. Contract or franchise requirement
- §91. Two-part rate combinations
- §92. Charter, contract, statutory, or franchise restrictions
- §93. Demand charge
- §94. Initial charge
- §95. Meter rental
- §96. Minimum bill or charge
- §97. Maximum charge or rate
- §98. Wholesale rates
- §99. Charge when service not used; discontinuance
- §100. Variable rates based on costs-generally
- §101. Fuel clauses
- §102. Installation, connection and disconnection charges
- §103. Charges to short time users

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

- §104. Electric and power
- §105. Demand, load and related factors
- §106. Special charges; amount and computation
- §107. Kinds and classes of service
- §108. Gas
- §109. Heating
- §110. Telecommunications
- §111. Water
- §112. Sewers
- §113. Joint Municipal Utility Commissions

VII. EMERGENCY AND TEMPORARY RATES

- §114. Emergency and temporary rates generally
- §115. What constitutes an emergency
- §116. Prices
- §117. Burden of proof to show emergencies

VIII. RATE DESIGN, CLASS COST OF SERVICE

- §118. Method of allocating costs

- §119. Rate design, class cost of service for electric utilities
- §120. Rate design, class cost of service for gas utilities
- §121. Rate design, class cost of service for water utilities
- §122. Rate design, class cost of service for sewer utilities
- §123. Rate design, class cost of service for telecommunications utilities
- §124. Rate design, class cost of service for heating utilities

RATES

II. REASONABLENESS-FACTORS AFFECTING REASONABLENESS

§8. Reasonableness generally. §10. Ability to pay. §20. Costs and expenses. §21. Discrimination, partiality, or unfairness. §22. Economic conditions. §28. Large consumption. The Commission approved a settlement that provided no funding to bring a sewer system into compliance with environmental regulations because the nature of the improvements, amount of funding needed, and the continued for-profit nature of the applicant, were not established on the record. **24 MPSC 3d 150**

Customers of a public utility filed a complaint charging that the public utility's rate design was not just and reasonable because the customer could no longer afford it. The Commission found that the rate had not become unjust and unreasonable because, though a customer's continued operation was valuable to the economy of Missouri, the relief was not determinative of the customer's continued operations sought and would not benefit the public utility's other ratepayers. **24 MPSC 3d 114**

§19. Contract or franchise rate. In calculating a gas company's revenue requirement, the Commission used the special contract rate that the gas company was required to collect from specified customers in accordance with the terms of a settlement, and refused to apply rates set by tariff for other customers. **24 MPSC 3d 205**

§47. Value of cost of the property. The Commission ordered the filing of tariffs that record the value of purchased assets at net original cost. **24 MPSC 3d 161**

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

§62. Initiation of rates and rate changes. The Commission denied the complaint of public utility customers, which alleged that the public utility's rates were unjust and unreasonable, because the relief requested was selective, and the customers' evidence of overearnings was limited and addressed less than all relevant factors. **24 MPSC 3d 136**

Customers of a public utility filed a complaint charging that the public utility's rate design was not just and reasonable because the

customer could no longer afford it. The Commission found that the rate had not become unjust and unreasonable because, though a customer's continued operation was valuable to the economy of Missouri, the relief was not determinative of the customer's continued operations sought and would not benefit the public utility's other ratepayers. **24 MPSC 3d 114**

IV. SCHEDULES, FORMALITIES AND PROCEDURE RELATING TO

§68. Establishment of rate base. The Commission approved a settlement that provided no funding to bring a sewer system into compliance with environmental regulations because the nature of the improvements, amount of funding needed, and the continued for-profit nature of the applicant, were not established on the record. **24 MPSC 3d 150**

§73. Period for which effective. The Commission denied a request that new rates be phased in because no party supporting that request showed how a phase-in would provide relief, considering that a carrying cost would be necessary. **24 MPSC 3d 161**

V. KINDS AND FORMS OF RATES AND CHARGES

§101. Fuel clauses. In a tariff case, setting an electric company's renewable energy standard rate adjustment mechanism, one of the parties asked the Commission to make determinations on amounts related to customer-owned solar generation and landfill gas. To address those issues hypothetically would generally constitute an unpublished regulation. And those amounts were part of the company's fuel adjustment clause, which was subject to change only in a general rate case, so to address those issues specifically would constitute an advisory opinion. Therefore, the Commission denied that request. **24 MPSC 3d 229**

VI. RATES AND CHARGES OF PARTICULAR UTILITIES

§104. Electric and power. §119. Rate design, class cost of service for electric utilities. Customers of a public utility filed a complaint charging that the public utility's rate design was not just and reasonable because the customer could no longer afford it. The Commission found that the rate had not become unjust and unreasonable because, though a customer's continued operation was valuable to the economy of Missouri, the relief was not determinative of the customer's continued operations sought and would not benefit the public utility's other ratepayers. **24 MPSC 3d 114**

SECURITY ISSUES

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Authorization by a corporation
- §4. Conversion, redemption and purchase by a corporation
- §5. Decrease of capitalization
- §6. Sinking funds
- §7. Dividends
- §8. Revocation and suspension of Commission authorization
- §9. Fees and expenses
- §10. Purchase by utility
- §11. Accounting practices

II. JURISDICTION AND POWERS

- §12. Jurisdiction and powers in general
- §13. Jurisdiction and powers of Federal Commissions
- §14. Jurisdiction and powers of the State Commission
- §15. Jurisdiction and powers of local authorities

III. NECESSITY OF AUTHORIZATION BY THE COMMISSION

- §16. Necessity of authorization by the Commission generally
- §17. Installment contracts
- §18. Refunding or exchange of securities
- §19. Securities covering utility and nonutility property
- §20. Securities covering properties outside the State

IV. FACTORS AFFECTING AUTHORIZATION

- §21. Factors affecting authorization generally
- §21.1. Effect on bond rating
- §22. Equity capital
- §23. Charters
- §24. Competition
- §25. Compliance with the terms of a mortgage or lease
- §26. Definite plans and purposes
- §27. Financial conditions and prospects
- §28. Use of proceeds
- §29. Dividends and dividend restrictions
- §30. Improper practices and irregularities
- §31. Intercompany relations
- §32. Necessity of issuance
- §33. Revenue
- §34. Rates and rate base

- §35. Size of the company
- §36. Title of property
- §37. Amount
- §38. Kind of security
- §39. Restrictions imposed by the security

V. PURPOSES AND SUBJECTS OF CAPITALIZATION

- §40. Purposes and subjects of capitalization generally
- §41. Additions and betterments
- §42. Appreciation or full plant value
- §43. Compensation for services and stockholders' contributions
- §44. Deficits and losses
- §45. Depreciation funds and requirements
- §46. Financing costs
- §47. Intangible property
- §48. Going value and good will
- §49. Stock dividends
- §50. Loans to affiliated interests
- §51. Overhead
- §52. Profits
- §53. Refunding, exchange and conversion
- §54. Reimbursement of treasury
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- §56. Working capital

VI. KINDS AND PROPORTIONS

- §57. Bonds or stock
- §58. Common or preferred stock
- §59. Stock without par value
- §60. Short term notes
- §61. Proportions of stock, bonds and other security
- §62. Proportion of debt to net plant

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- §63. Sale price and interest rates generally
- §64. Bonds
- §65. Notes
- §66. Stock
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- §69. Financing methods and practices generally
- §70. Leases

- §71. Financing expense
- §72. Payment for securities
- §73. Prospectuses and advertising
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IX. PARTICULAR UTILITIES

- §76. Telecommunications
- §77. Electric and power
- §78. Gas
- §79. Sewer
- §80. Water
- §81. Miscellaneous

SECURITY ISSUES

No headnotes in this volume involved the question of security issues.

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- §1. Generally
- §2. What constitutes adequate service
- §3. Obligation of the utility
- §4. Abandonment, discontinuance and refusal of service
- §5. Contract, charter, franchise and ordinance provisions
- §6. Restoration or continuation of service
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- §7.1. Change of supplier
- §8. Discrimination

II. JURISDICTION AND POWERS

- §9. Jurisdiction and powers generally
- §10. Jurisdiction and powers of the Federal Commissions
- §11. Jurisdiction and powers of the State Commission
- §12. Jurisdiction and powers over service outside of the state
- §13. Jurisdiction and powers of the courts
- §14. Jurisdiction and powers of local authorities
- §15. Limitations on jurisdiction
- §16. Enforcement of duty to serve

III. DUTY TO SERVE

- §17. Duty to serve in general

- §18. Duty to render adequate service
- §19. Extent of profession of service
- §20. Duty to serve as affected by contract
- §21. Duty to serve as affected by charter, franchise or ordinance
- §22. Duty to serve persons who are not patrons
- §23. Reasons for failure or refusal to serve
- §24. Duty to serve as affected by inadequate revenue

IV. OPERATIONS

- §25. Operations generally
- §26. Extensions
- §27. Trial or experimental operation
- §28. Consent of local authorities
- §29. Service area
- §30. Rate of return
- §31. Rules and regulations
- §32. Use and ownership of property
- §33. Hours of service
- §34. Restriction on service
- §35. Management and operation
- §36. Maintenance
- §37. Equipment
- §38. Standard service
- §39. Noncontinuous service

V. SERVICE BY PARTICULAR UTILITIES

- §40. Gas
- §41. Electric and power
- §42. Heating
- §43. Water
- §44. Sewer
- §45. Telecommunications

VI. CONNECTIONS, INSTRUMENTS AND EQUIPMENT

- §46. Connections, instruments and equipment in general
- §47. Duty to install, own and maintain
- §48. Protection, location and liability for damage
- §49. Restriction and control of connections, instruments and equipment

SERVICE

No headnotes in this volume involved the question of service.

SEWER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the Federal Commissions
- §7. Jurisdiction and powers of the State Commission
- §8. Jurisdiction and powers of local authorities
- §9. Territorial agreements

III. OPERATIONS

- §10. Operation generally
- §11. Construction and equipment
- §12. Maintenance
- §13. Additions and betterments
- §14. Rates and revenues
- §15. Return
- §16. Costs and expenses
- §17. Service
- §18. Depreciation
- §19. Discrimination
- §20. Apportionment
- §21. Accounting
- §22. Valuation
- §23. Extensions
- §24. Abandonment or discontinuance
- §25. Reports, records and statements
- §26. Financing practices
- §27. Security issues
- §28. Rules and regulations
- §29. Billing practices
- §30. Eminent domain
- §31. Accounting Authority orders

SEWER

I. IN GENERAL

- §2. Certificate of convenience and necessity. The Commission

granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's application for a certificate of convenience and necessity to the other company. **24 MPSC 3d 4**

The Commission authorized one sewer company to buy another, conditioned on contracts for operation, billing, and emergency answering arrangements. **24 MPSC 3d 202**

§4. Transfer, lease and sale. The Commission authorized one sewer company to buy another, conditioned on contracts for operation, billing, and emergency answering arrangements. **24 MPSC 3d 202**

III. OPERATIONS

§13. Additions and betterments. The Commission excluded from a water company's rate base the cost of equipment to serve customers in excess of the number it had. **24 MPSC 3d 9**

§14. Rates and revenues. The Commission excluded availability fees from a water and sewer company's rate base and revenues. **24 MPSC 3d 35**

§16. Costs and expenses. The Commission included in a water company rate base the company's costs for employee salaries, vehicle mileage, telephone and internet service, sludge hauling, environmental management and testing, office supplies and postage for an environmental consumer confidence report, late fees. **24 MPSC 3d 9**

The Commission determined which hearing-related expenses to include in a public utility's rates, including attorney and consultant fees, company employee salaries and wages, mileage, lodging, and meals. **24 MPSC 3d 101**

§18. Depreciation. The Commission included in a water company rate base a depreciation rate and amount that included the removal of a damaged pump not yet accounted for. **24 MPSC 3d 9**

§21. Accounting. The Commission follows its own regulation, which requires a public utility to record its expenses and revenues in accordance with the Uniform System of Accounts. **24 MPSC 3d 9**

STEAM

I. IN GENERAL

- §1. Generally**
- §2. Obligation of the utility**

- §3. Certificate of convenience and necessity
- §4. Transfer, lease and sale
- §4.1. Change of suppliers
- §5. Charters and franchise
- §6. Territorial agreements

II. JURISDICTION AND POWERS

- §7. Jurisdiction and powers generally
- §8. Jurisdiction and powers of Federal Commissions
- §9. Jurisdiction and powers of the State Commission
- §10. Jurisdiction and powers of the local authorities
- §11. Territorial agreements
- §12. Unregulated service agreements

III. OPERATIONS

- §13. Operations generally
- §14. Rules and regulations
- §15. Cooperatives
- §16. Public corporations
- §17. Abandonment and discontinuance
- §18. Depreciation
- §19. Discrimination
- §20. Rates
- §21. Refunds
- §22. Revenue
- §23. Return
- §24. Services generally
- §25. Competition
- §26. Valuation
- §27. Accounting
- §28. Apportionment
- §29. Rate of return
- §30. Construction
- §31. Equipment
- §32. Safety
- §33. Maintenance
- §34. Additions and betterments
- §35. Extensions
- §36. Local service
- §37. Liability for damage
- §38. Financing practices
- §39. Costs and expenses
- §40. Reports, records and statements
- §41. Billing practices
- §42. Planning and management

- §43. Accounting Authority orders
- §44. Safety
- §45. Decommissioning costs

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §46. Relations between connecting companies generally
- §47. Physical connection
- §48. Contracts
- §49. Records and statements

STEAM

No headnotes in this volume involved the question of steam.

TELECOMMUNICATIONS

I. IN GENERAL

- §1. Generally
- §2. Obligation of the utility
- §3. Certificate of convenience and necessity
- §3.1. Certificate of local exchange service authority
- §3.2. Certificate of interexchange service authority
- §3.3. Certificate of basic local exchange service authority
- §4. Transfer, lease and sale

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers of local authorities
- §6. Jurisdiction and powers of Federal Commissions
- §7. Jurisdiction and powers of the State Commission

III. OPERATIONS

- §8. Operations generally
- §9. Public corporations
- §10. Abandonment or discontinuance
- §11. Depreciation
- §12. Discrimination
- §13. Costs and expenses
- §13.1. Yellow Pages
- §14. Rates
- §14.1. Universal Service Fund
- §15. Establishment of a rate base
- §16. Revenue

- §17. Valuation
- §18. Accounting
- §19. Financing practices
- §20. Return
- §21. Construction
- §22. Maintenance
- §23. Rules and regulations
- §24. Equipment
- §25. Additions and betterments
- §26. Service generally
- §27. Invasion of adjacent service area
- §28. Extensions
- §29. Local service
- §30. Calling scope
- §31. Long distance service
- §32. Reports, records and statements
- §33. Billing practices
- §34. Pricing policies
- §35. Accounting Authority orders

IV. RELATIONS BETWEEN CONNECTING COMPANIES

- §36. Relations between connecting companies generally
- §37. Physical connection
- §38. Contracts
- §39. Division of revenue, expenses, etc.

V. ALTERNATIVE REGULATION AND COMPETITION

- §40. Classification of company or service as noncompetitive, transitionally, or competitive
 - §41. Incentive regulation plans
 - §42. Rate bands
 - §43. Waiver of statutes and rules
 - §44. Network modernization
 - §45. Local exchange competition
 - §46. Interconnection Agreements
 - §46.1 Interconnection Agreements-Arbitrated
 - §47. Price Cap

TELECOMMUNICATIONS

III. OPERATIONS

§10. Abandonment or discontinuance. The Commission revoked the registration of an interconnected voice over internet protocol service

provider on proof that the provider could no longer provide telecommunications services. **24 MPSC 3d 100**

§14.1 Universal Service Fund. The Commission reduced the assessment on telecommunications companies, and increased the support rate, for the Missouri Universal Service Fund ("USF"). **24 MPSC 3d 112**

§18. Costs and expenses. The Commission determined which hearing-related expenses to include in a public utility's rates, including attorney and consultant fees, company employee salaries and wages, mileage, lodging, and meals. **24 MPSC 3d 101**

VALUATION

I. IN GENERAL

- §1. Generally
- §2. Constitutional limitations
- §3. Necessity for
- §4. Obligation of the utility

II. JURISDICTION AND POWERS

- §5. Jurisdiction and powers generally
- §6. Jurisdiction and powers of the State Commission
- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of local authorities

III. METHODS OR THEORIES OF VALUATION

- §9. Methods or theories generally
- §10. Purpose of valuation as a factor
- §11. Rule, formula or judgment as a guide
- §12. Permanent and tentative valuation

IV. ASCERTAINMENT OF VALUE

- §13. Ascertainment of value generally
- §14. For rate making purposes
- §15. Purchase or sale price
- §16. For issuing securities

V. FACTORS AFFECTING VALUE OR COST

- §17. Factors affecting value or cost generally
- §18. Contributions from customers
- §19. Appreciation
- §20. Apportionment of investment or costs
- §21. Experimental or testing cost

- §22. Financing costs
- §23. Intercompany relationships
- §24. Organization and promotion costs
- §25. Discounts on securities
- §26. Property not used or useful
- §27. Overheads in general
- §28. Direct labor
- §29. Material overheads
- §30. Accidents and damages
- §31. Engineering and superintendence
- §32. Preliminary and design
- §33. Interest during construction
- §34. Insurance during construction
- §35. Taxes during construction
- §36. Contingencies and omissions
- §37. Contractor's profit and loss
- §38. Administrative expense
- §39. Legal expense
- §40. Promotion expense
- §41. Miscellaneous

VI. VALUATION OF TANGIBLE PROPERTY

- §42. Buildings and structures
- §43. Equipment and facilities
- §44. Land
- §45. Materials and supplies
- §46. Second-hand property
- §47. Property not used and useful

VII. VALUATION OF INTANGIBLE PROPERTY

- §48. Good will
- §49. Going value
- §50. Contracts
- §51. Equity of redemption
- §52. Franchises
- §53. Leases and leaseholds
- §54. Certificates and permits
- §55. Rights of way and easements
- §56. Water rights

VIII. WORKING CAPITAL

- §57. Working capital generally
- §58. Necessity of allowance
- §59. Factors affecting allowance

- §60. Billing and payment for service
- §61. Cash on hand
- §62. Customers' deposit
- §63. Expenses or revenues
- §64. Prepaid expenses
- §65. Materials and supplies
- §66. Amount to be allowed
- §67. Property not used or useful

IX. DEPRECIATION

- §68. Depreciation generally
- §69. Necessity of deduction for depreciation
- §70. Factors affecting propriety thereof
- §71. Methods of establishing rates or amounts
- §72. Property subject to depreciation
- §73. Deduction or addition of funds or reserve

X. VALUATION OF PARTICULAR UTILITIES

- §74. Electric and power
- §75. Gas
- §76. Heating
- §77. Telecommunications
- §78. Water
- §79. Sewer

VALUATION

§72. Property subject to depreciation. The Commission rejected a party's proposed depreciation of computer hardware and software at 4.75% over 21 years as unreasonably long. **24 MPSC 3d 205**

WATER

I. IN GENERAL

- §1. Generally
- §2. Certificate of convenience and necessity
- §3. Obligation of the utility
- §4. Transfer, lease and sale
- §5. Joint Municipal Utility Commissions

II. JURISDICTION AND POWERS

- §6. Jurisdiction and powers generally

- §7. Jurisdiction and powers of the Federal Commissions
- §8. Jurisdiction and powers of the State Commission
- §9. Jurisdiction and powers of local authorities
- §10. Receivership
- §11. Territorial Agreements

III. OPERATIONS

- §12. Operation generally
- §13. Construction and equipment
- §14. Maintenance
- §15. Additions and betterments
- §16. Rates and revenues
- §17. Return
- §18. Costs and expenses
- §19. Service
- §20. Depreciation
- §21. Discrimination
- §22. Apportionment
- §23. Accounting
- §24. Valuation
- §25. Extensions
- §26. Abandonment or discontinuance
- §27. Reports, records and statements
- §28. Financing practices
- §29. Security issues
- §30. Rules and regulations
- §31. Billing practices
- §32. Accounting Authority orders

WATER

I. IN GENERAL

§2. Certificate of convenience and necessity. The Commission granted an application to transfer the assets of a water and sewer company to another company, and transferred the other company's application for a certificate of convenience and necessity to the other company. **24 MPSC 3d 4**

When a water company bought an unregulated entity, the Commission granted the water company's application for a certificate of convenience and necessity to serve the area formerly served by the unregulated entity, subject to conditions related to tariffs, depreciation, records, service calls, meter-reading, and billing. **24 MPSC 3d 199**

III. OPERATIONS

§15. Additions and betterments. The Commission excluded from a water company's rate base the cost of equipment to serve customers in excess of the number it had. **24 MPSC 3d 9**

§16. Rates and revenues. The Commission excluded availability fees from a water and sewer company's rate base and revenues. **24 MPSC 3d 35**

§18. Costs and expenses. The Commission included in a water company rate base the company's costs for employee salaries, vehicle mileage, telephone and internet service, sludge hauling, environmental management and testing, office supplies and postage for an environmental consumer confidence report, late fees. **24 MPSC 3d 9**

The Commission determined which hearing-related expenses to include in a public utility's rates, including attorney and consultant fees, company employee salaries and wages, mileage, lodging, and meals. **24 MPSC 3d 101**

§20. Depreciation. The Commission included in a water company rate base a depreciation rate and amount that included the removal of a damaged pump not yet accounted for. **24 MPSC 3d 9**

§23. Accounting. The Commission follows its own regulation, which requires a public utility to record its expenses and revenues in accordance with the Uniform System of Accounts. **24 MPSC 3d 9**